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No. ____

In the Supreme Court of the United States

FRED DECKER, ALBERTA BRYANT,
DIANA EVANS, AND CHARLES SAUVIE,
Petitioners,

v.

BILL BRADBURY, SECRETARY OF STATE OF OREGON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether Oregon's multi-day unrestricted vote-by-mail system irreconcilably conflicts with the federal election day statutes, 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1, which establish "the Tuesday next after the First Monday in November" as "the day" for the election of representatives and senators and the appointment of presidential electors.

2) Whether Oregon's multi-day unrestricted vote-by-mail system is preempted because it interferes with the means (single-day voting) chosen by Congress to combat voting fraud in federal elections.

PARTIES TO THE PROCEEDING

With the exception of The Voting Integrity Project, Inc., which was a party below but is not a petitioner in this Court, the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: Petitioners Fred Decker, Alberta Bryant, Diana Evans, and Charles Sauvie; and Respondent Bill Bradbury*, Secretary of State of Oregon.

* When this lawsuit was filed, the Secretary of State of Oregon was Phil Keisling. Mr. Keisling left office subsequent to the submission of this case to the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Fred Decker, Alberta Bryant, Diana Evans, and Charles Sauvie respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported as *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001), and reprinted in the Appendix ("App.") at 1-16. The decision of the Court of Appeals affirmed the District Court's decision, which is unreported but is

available online as *Voting Integrity Project, Inc. v. Keisling*, 1999 U.S. Dist. LEXIS 22727 (D. Or. Mar. 22, 1999), and is reprinted at App. 17-30.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit entered its judgment and opinion on July 11, 2001. The Ninth Circuit denied a petition for panel and *en banc* rehearing on August 28, 2001. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The United States Constitution, Article I, Section 4, clause 1, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The United States Constitution, Article II, Section 1, clause 4, provides:

> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

2 U.S.C. § 1 provides:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next.

2 U.S.C. § 7 provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

3 U.S.C. § 1 provides:

> The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

Act of May 23, 1872, ch. CXCVIII, 17 Stat. 157, provides:

> Be it enacted by the Senate and House of representatives of the United States of America in Congress assembled, That if by the now existing

laws of any State the election commencing on the Tuesday next after the first Monday in November, eighteen hundred and seventy-two, for the purpose of choosing electors of President and Vice-President in such State shall be required to be continued for more than one day, then said election shall be continued the number of days required by the laws of such States.

Oregon Revised Statutes § 254.465(1) provides:

> An election held on the date of the biennial primary or general election shall be conducted by mail.

Oregon Revised Statutes § 254.470 provides:

> (1) Notwithstanding ORS 254.465 (1), at each biennial primary election and general election, the county clerk shall maintain voting booths in the county as follows:
>
> > (a) In each county with 35,000 or more electors in the county, the county clerk shall maintain a number of voting booths equal to at least one voting booth for every 20,000 electors in the county; and
> >
> > (b) In each county with fewer than 35,000 electors in the county, the county clerk shall maintain at least one voting booth.
>
> (2) The county clerk may determine the location of the voting booths required under this section.

(3)

(a) Except as provided in paragraphs (b), (c) and (d) of this subsection, the county clerk shall mail by nonforwardable mail an official ballot with a return identification envelope and a secrecy envelope not sooner than the 18th day before the date of an election conducted by mail and not later than the 14th day before the date of the election, to each active elector of the electoral district as of the 21st day before the date of the election.

(b) Notwithstanding paragraph (a) of this subsection, if the county clerk determines that an active elector of the electoral district as of the 21st day before the date of the election does not receive daily mail service from the United States Postal Service, the county clerk shall mail by nonforwardable mail an official ballot with a return identification envelope and a secrecy envelope to the elector not sooner than the 20th day before the date of an election conducted by mail and not later than the 18th day before the date of the election.

(c) Notwithstanding paragraph (a) of this subsection, the Secretary of State by rule shall specify the date on which all ballots shall be mailed for any state election conducted by mail under ORS 254.465 (2).

(d) Notwithstanding paragraph (a) of this subsection, in the case of ballots to be mailed to addresses outside this state to electors who

> are not long-term absent electors, the county clerk may mail the ballots not sooner than the 29th day before the date of the election.

42 U.S.C. § 1973aa-1 provides, in pertinent parts:

> (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections: (1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President; (2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines; (3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution; (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote; (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and (6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.
>
> (b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the

enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

STATEMENT OF THE CASE

I. Oregon's Unrestricted Multi-Day Vote-by-Mail System

Oregon has adopted a novel procedure that allows all voters to vote by mail for a substantial period of time prior to election day. App. 4. Early voting under this system is unrestricted. Indeed, it is encouraged, because the number of polling places around the state on federal election day has been sharply reduced, and voters might have to travel some distance in larger counties to vote at the few open polling places on election day.

In the 2000 federal general election, Oregonians voted by mail during a three-week period under the new system. Approximately eighty percent (80%) of the votes cast in Oregon's election for presidential electors were cast prior to the federal election day.[1] Oregon's vote-by-mail experiment contributed to the chaos of the 2000 presidential election, as final results in Oregon were not known for weeks. *See, e.g.*, Jim Carlton, *Election 2000: As Oregon's Vote by Mail Melted Down, Its Creator Was Elsewhere*, WALL STREET J., Nov. 14, 2000, at A19.

II. The District Court Proceeding

On November 4, 1998, the day after Oregon voters approved a ballot initiative establishing a system of voting by mail in Oregon elections, the Voting Integrity Project, Inc. ("VIP") and four Oregon voters commenced this action in the U.S. District Court for the District of Oregon

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[1] *See* Respondent's Internet web site at: http://www.sos.state.or.us/elections/nov72000/other.info/g00cum.htm

for declaratory and injunctive relief against Phil Keisling, who was then Oregon's Secretary of State. Their complaint challenged the new Oregon vote-by-mail system as it operates in federal elections on the basis that federal statutes from 1845 (3 U.S.C. § 1) and 1872 (2 U.S.C. §§ 1, 7) (the "federal election day statutes") establish a single day for voting in presidential and congressional elections.

After the parties cross-moved for summary judgment, the district court granted summary judgment to the State on March 22, 1999. The district court reasoned that that the term "appoint" in 3 U.S.C. § 1 (requiring that states appoint presidential electors on federal election day) only required that votes be *tallied* on election day, and did not require actual voting on election day. App. 24. With respect to 2 U.S.C. §§ 1 and 7, the district court held that allowing early voting did not change "the day for the election" within the meaning of those statutes, because "[i]f it did, then all state absentee balloting laws would be preempted by federal law." App. 25.

III. The Ninth Circuit Decision

VIP appealed to the U.S. Court of Appeals for the Ninth Circuit, which heard argument on September 13, 1999, and ruled on July 11, 2001. The Ninth Circuit's decision, authored by Judge Andrew Kleinfeld and joined by Judges William Fletcher and Ruggero Aldisert, affirmed the district court's grant of summary judgment to the State but applied an entirely different rationale. App. 1-16. Writing for the court, Judge Kleinfeld called this a "difficult case." App. 13.

A. The Ninth Circuit's Acknowledgment that the Federal Election Day Statutes Standing Alone Limit Voting to a Single Day

The Ninth Circuit acknowledged the force of the petitioners' contention that both the text and legislative history of the federal election day statutes demonstrate that Congress intended to confine voting in federal elections to a single day. App. 6 ("[T]his textual argument has considerable force"); App. 7 (noting that legislative history shows that "it is plain that Congress considered and rejected the practice of multi-day voting allowed by some states"); App. 13 ("[W]hat we have so far is a statute that, taking the text and its history by themselves, seems to imply that multi-day elections are not permitted."); App. 15 ("[W]e have one statute that may reasonably be construed to mean that all voting in federal elections should take place on a single day. The legislative history supports that interpretation.").

B. The Ninth Circuit's Treatment of *Foster v. Love*

The Ninth Circuit suggested, however, that this Court's opinion in *Foster v. Love*, 522 U.S. 67 (1997), may cut in favor of upholding Oregon's vote-by-mail statutes. In *Foster*, the Court struck down Louisiana's open primary scheme, under which all candidates for House and Senate ran together in a primary in October. If a candidate won a majority of the votes, the candidate was elected. *Id.* at 70. If no candidate won a majority, a run-off between the top two candidates was held on federal election day. *Foster* defined "election" for the purposes of the federal election day statutes as "the combined actions of voters and officials meant to make a final selection of

an officeholder." *Id.* at 71. In the Ninth Circuit's view, that

> definition cuts in favor of the Oregon law, because in Oregon the "final selection" cannot be made until the federal election day, while in Louisiana, it could be and ordinarily was made prior to federal election day.

App. 12.

The Ninth Circuit found that the "*Foster* definition of 'election' implies that there is only a single election day in Oregon, when the election is 'consummated,' even though there are prior voting days." App. 13. "Nevertheless," the panel emphasized, "*Foster* decided a different question, so its answer may not be controlling." *Id.* The panel conceded, in other words, that *Foster* did *not* require that the Oregon laws be upheld, because the issue of whether a state can *begin* an election before federal election day was not before the Court in *Foster*, which only involved the issue of whether states could *conclude* federal elections prior to election day.

C. The Ninth Circuit's "Reconciliation" of the Federal Election Day Statutes with Congressional "Tolerance" of Absentee Voting Practices and the Voting Rights Act Amendments of 1970

What ultimately persuaded the Ninth Circuit to uphold the Oregon multi-day vote-by-mail scheme, despite the scheme's apparent conflict with the federal election day statutes standing alone, was "the long history of

congressional tolerance, despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue." App. 13. The Ninth Circuit found "it difficult to reconcile a decision rejecting the Oregon law with the maintenance of absentee balloting." *Id.*

Citing the 1970 Voting Rights Act Amendments, 42 U.S.C. § 1973aa-1 (the "VRAA"), the Ninth Circuit stated that "Congress has recently required, not just allowed, states to provide absentee voting in federal elections." App. 14. The panel noted that the federal requirement for absentee voting is limited to "duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held." *Id.* The panel continued:

> By itself, this provision might be taken to imply that absence from the district on election day is a prerequisite for absentee voting. But Congress expressly prohibited that restrictive inference. It provided that "[n]othing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein." The "section" referred to is 1973-aa-1, which speaks to residence requirements for voting, registration, and absentee voting. The "less restrictive voting practices" allowed by the section would then include less restrictive absentee voting practices.

Id. (quoting 42 U.S.C. § 1973aa-1(g)). The Ninth Circuit also observed that the congressional findings of fact in the

statute say that "lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections" denies or abridges citizens' rights. *Id.* (citing 42 U.S.C. § 1973aa-1(a)).

The Ninth Circuit concluded that the federal election day statutes "may be reasonably construed to mean that all voting in federal elections should take place on a single day. The legislative history supports that interpretation." App. 15. The VRAA, however, "plainly provides for liberality toward absentee balloting." *Id.* The Ninth Circuit recognized that it had "a duty to construe statutes harmoniously where that can reasonably be done." *Id.* The court decided that it could only construe the federal election day statutes and the VRAA harmoniously if it used the "final selection" definition of "election" from *Foster* to declare that Oregon is in compliance with the federal election day statutes, *id.*, even though it had recognized previously that *Foster* decided a different question and may not be controlling. App. 13.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Failed to Recognize the Irreconcilable Conflict Between the Oregon Vote-by-Mail System and the Federal Election Day Statutes.

A. Congress Enacted the Federal Election Day Statutes to Confine Voting to a Single Day as a Means to Combat Election Fraud.

In 1845, Congress enacted a statute now codified as 3 U.S.C. § 1, which provides: "The electors of President and Vice President shall be appointed, in each State, on the

Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." Congress required that "'time must be uniform in the states'" as a means to combat election fraud in presidential elections. App. 7 (citing CONG. GLOBE, 28th Cong., 2d Sess. 15 (1844)); *see also* R. MORTON & K. WILLIAMS, LEARNING BY VOTING: SEQUENTIAL CHOICES IN PRESIDENTIAL PRIMARIES AND OTHER ELECTIONS, at chap. 1 (2001) (noting that 3 U.S.C. § 1 was enacted in response to abuses in the presidential election of 1840, in which "hordes of voters, having cast ballots in their home states, crossed into neighboring states with later election days and voted a second time").

In 1872, the Forty-Second Congress amended 3 U.S.C. § 1 to permit, in the presidential election of 1872 *only*, states to hold their polls open for several days (as opposed to a single day). *See* Act of May 23, 1872, ch. CXCVIII, 17 Stat. 157, reprinted at 3-4, *supra*. Although not codified in the United States Code, this special statutory exception to 3 U.S.C. § 1 remains part of the Statutes at Large and provides context to the meaning of 3 U.S.C. § 1.[2]

In 1872, the Forty-Second Congress also aligned the date of congressional elections with presidential elections by enacting 2 U.S.C. § 7, which provides that in every state, "the Tuesday next after the 1st Monday in November, in every even numbered year, is established as

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[2] Where there is a conflict between the Statutes at Large and the United States Code, the former prevails. *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

the day for the election" for representatives to Congress. 2 U.S.C. § 7 (emphasis added).

The principal sponsor of 2 U.S.C. § 7 explained that one of the purposes of the act was to have a single uniform day for voting in congressional and presidential elections. *See* CONG. GLOBE, 42d Cong., 2d Sess. 112 (1871) (remarks of Rep. Butler) ("*[O]n the day when one votes all should vote*, and . . . the whole question should be decided then.") (emphasis added). He further explained that a single uniform day for voting in federal elections would serve the purpose of combating election fraud. App. 8 (citing CONG. GLOBE, 42d Cong., 2d Sess. 112).

When the Forty-Second Congress considered the legislation that became 2 U.S.C. § 7, it was aware that Texas then allowed *four days* for balloting in congressional elections because Texas law required voting at the county seat, and "it would be impracticable for all the voters of the county to go to the county seat and vote on one day." CONG. GLOBE, 42d Cong., 2d Sess. 676 (1872) (remarks of Sen. Trumbull). Because of this situation in Texas, an amendment to 2 U.S.C. § 7 was proposed that would have allowed Texas and other states to have multiple-day balloting. The Forty-Second Congress rejected the amendment, in part because the new legislation would not take effect until 1876, and Texas would have four years to restructure its election system to conform to federal law, and in part because of concerns over opportunities for election fraud inherent in multi-day voting:

> Whenever you provide that elections shall take place upon the same day, *you do interpose a not inconsiderable check to*

> *fraud in elections, to double voting, to the transmission of voters from one State to another. . . .*

App. 9 (emphasis added) (citing CONG. GLOBE, 42d Cong., 2d Sess. 618 (1872).

Following ratification of the Seventeenth Amendment (providing for the direct election of senators), Congress designated federal election day as the uniform national election date for senators. *See* 2 U.S.C. § 1. By aligning the election of senators under this section with the election date for representatives, a date that Congress had previously designated for presidential elections, Congress linked *all* federal elections and required such elections to be held "*on a single day throughout the Union.*" *Foster*, 522 U.S. at 70 (1997) (emphasis added).

B. The Oregon System Interferes with the Method Chosen by Congress to Combat Election Fraud and Is Therefore Preempted.

Preemption results if state law "interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Int'l Paper Co. v. Ouellette*, 439 U.S. 481, 494 (1987) (emphasis added); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881-82 (2000). Because the Oregon system interferes with the method chosen by Congress to combat election fraud, i.e., single-day voting, the Oregon system is necessarily preempted. *See also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that preemption results when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

C. As the Ninth Circuit Acknowledged, Standard Canons of Statutory Construction Confirm that the Federal Election Day Statutes, Standing Alone, Confine Voting to a Single Day.

The relevant federal statutes (2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1) do not define the term "election." When a statutory term is undefined, it must be interpreted "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). In *Meyer*, this Court looked to *Black's Law Dictionary* to ascertain the ordinary or natural meaning of an undefined statutory term. *See Meyer*, 510 U.S. at 476. *Black's* defines "election" as "the expression *by vote* of the will of the people." BLACK'S LAW DICTIONARY 518 (6th ed. 1990) (emphasis added). Similarly, the 1869 *Webster's American Dictionary of the English Language* relied upon by this Court in *Foster*, 522 U.S. at 71, defines "election" as "the act of choosing a person to fill an office or employment, by any manifestation of preference, *as by ballot*" (emphasis added). Thus, there can be no dispute that the plain and ordinary meaning of the word "election" means *voting* to select an officeholder.

Thus the federal election day statutes mean "voting" when they refer to "election." The next question of statutory construction is whether federal election day is the *exclusive* day of the election, and thus voting. This question is answered by the *expressio unius* canon of statutory construction, which holds that when "'a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (quoting *Botany Worsted Mills v. United*

States, 278 U.S. 282, 289 (1929)). Under the *expressio unius* principle, by designating federal election day as *the* day for the election, Congress *prohibited* holding the election on any other day or days.

In sum, there can be no serious dispute that the text of the federal election day statutes, standing alone, limits voting in federal elections to a single day. As the Ninth Circuit conceded, "this textual argument has considerable force." App. 6.

D. The Ninth Circuit Decision Conflicts with This Court's Decision in *Crosby* Because It Attaches Significance to Congressional *Inaction*.

Not withstanding the plain text of the federal election day statutes, the Ninth Circuit concluded that that Oregon's multi-day voting system did not conflict with these statutes because, *inter alia*, Congress has shown "tolerance" for absentee voting by failing to take measures to curb it through express preemption. App. 13-14.

The Ninth Circuit plainly erred in attaching significance to Congress's failure to expressly preempt absentee and early voting systems of which it was aware. Recently, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), this Court rejected an identical argument that Congress's failure to curb – through express preemption – practices of which it was aware implied approval of those practices for purposes of determining whether such practices conflicted with federal law. *See id.* at 388 ("The State's inference of congressional intent is unwarranted here, therefore, simply *because the silence of Congress is ambiguous*.") (emphasis added). By attaching

significance in a conflict preemption analysis to the inaction of Congress, the Ninth Circuit's opinion clearly conflicts with *Crosby*.

In short, Congress's failure to take action against practices of which it is aware has no bearing on whether such practices violate preexisting features of federal law, and the Ninth Circuit erred by deeming such inaction to be "tolerance."

E. The Ninth Circuit's "Reconciliation" of the Federal Election Day Statutes with the VRAA Conflicts with this Court's Presumption Against Implied Repeals.

The Ninth Circuit cited three provisions of the VRAA as evidence of congressional approval for absentee balloting and thus Oregon's multi-day vote-by-mail system:

1) Section 1973aa-1(d), which requires states to permit absentee balloting *in presidential elections* (the VRAA does not apply to congressional elections) for voters "who may be absent from their election district or unit in such State on the day such election is held." 42 U.S.C. § 1973aa-1(d);

2) Section 1973aa-1(g), a general saving clause that provides that "[n]othing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein." 42 U.S.C. § 1973aa-1(g); and

3) Section 1973aa-1(a)(1), a policy section that declares that "the lack of sufficient opportunities for absentee

registration and absentee balloting in presidential elections" deny voters their constitutional right to vote. 42 U.S.C. § 1973aa-1(a)(1).

None of these provisions can be read as impliedly repealing the federal election day statutes enacted in 1845 and 1872. Yet the Ninth Circuit effectively gave the VRAA precisely such a construction ostensibly in the name of "reconciling" the two statutory schemes. In doing so, it reached a result contrary to several holdings of this Court.

1. The VRAA Applies Only to *Presidential* Elections and Cannot Be Said to Affect 2 U.S.C. §§ 1 and 7, Which Govern the Timing of *Congressional* Elections.

The VRAA cannot be read to permit voting for *Senator or Representative* on a day other than federal election day. The Ninth Circuit determined that under the federal election day statutes, "all voting in federal elections should take place on a single day." App. 15. The Ninth Circuit found, however, that "another statute, of equal force, plainly provides for liberality toward absentee balloting." *Id.* But that "other statute," the VRAA, by its own terms applies only to "*presidential* elections." 42 U.S.C. § 1973aa-1(b) (emphasis added). The VRAA does not mandate that states provide citizens with the ability to vote by absentee ballot for candidates for *Senator or Representative*. It makes no findings or declarations with respect to congressional elections.

Even if the Court were to find that the enactment of the VRAA had the effect of permitting unrestricted voting by mail in *presidential* elections, voting by mail in

congressional elections, which the Oregon statutes provide for, would still be prohibited by 2 U.S.C. §§ 1 and 7. Because the VRAA does not "cover[ ] the whole subject" of 2 U.S.C. §§ 1 and 7, it cannot have any effect on them. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 157 (1976).

2. Section 1973aa-1(d) Creates a Limited Exception to the 1845 Federal Statute Governing Presidential Elections Rather than Impliedly Repealing It.

Section 1973aa-1(d) of the VRAA requires states to permit absentee voting in presidential elections for those voters who will be absent from their voting jurisdiction on election day. The Ninth Circuit decided that Section 1973aa-1(d) impliedly repealed 3 U.S.C. § 1. The court did not say that explicitly. Rather, it wrote that it was merely bringing the two statutes into harmony. App. 15. The court concluded, however, that while the federal election day statutes limit voting to a single day, the VRAA eliminated that restriction. In "harmonizing" two statutes, a court cannot simply obliterate the earlier one. Yet that is precisely what the Ninth Circuit did.

It is "a cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1940). When there are two acts that address the same subject, the rule is to give effect to both if possible. *Id.* It is

> not sufficient as was said by Mr. Justice Story in *Wood v. United States* "to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may

> be merely affirmative, or cumulative, or auxiliary." *There must be "a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy.*"

Id. at 198-99 (emphasis added and citations omitted); *see also Radzanower*, 426 U.S. at 157 (stating that when two statutes are in conflict, "[r]epeal [of the earlier statute] is to be regarded as implied only if necessary to make the [later Act] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.") (quoting *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 357 (1963)).

Put another way, "[w]here the later special or local statute is not irreconcilable with the general statute to the degree that both statutes cannot have a coincident operation, *the general statute will not be repealed, but the special or local statute will exist as an exception to its terms.*" SINGER, 1A SUTHERLAND'S STATUTORY CONSTRUCTION § 23.16 at 381 (5th ed. 1991) (emphasis added). The Ninth Circuit should have treated Section 1973aa-1(d) as a limited exception to the general rule of 3 U.S.C. § 1 that presidential elections be held on a single day. It is not necessary that 3 U.S.C. § 1 be wholly repealed in order to make Section 1973aa-1(d) work.

Rather than applying *Radzanower*'s "guiding principle to reconciliation of the two statutory schemes," 426 U.S. at 157, the Ninth Circuit applied a definition of "election" from a case, *Foster*. But as the court admitted, "*Foster* decided a different question, so its answer may not be controlling." App. 13. There can be no question,

however, that *Radzanower* controls and the failure of the Ninth Circuit to follow it was error.

3. The VRAA's Saving Clause Does Not Apply to or Limit the Preemptive Effect of the Federal Election Day Statutes.

The VRAA's general saving clause in § 1973aa-1(g) does not conflict with or otherwise limit the preemptive effect of the federal election day statutes. Section 1973aa-1(g) provides only that "nothing *in this section*" shall bar states from adopting less restrictive voting practices. On its face, therefore, Section 1973aa-1(g) has no bearing on the preemptive effect of *other* federal statutes.

This Court has held repeatedly that saving clauses that are restricted to a particular statute cannot be read to limit the preemptive effect of entirely different federal statutes. *See United States v. Locke*, 529 U.S. 89, 106 (2000) (holding that saving clause explicitly limited to "this Act" did not "alter the pre-emptive effect" of entirely different Act of Congress); *Ouellette*, 479 U.S. at 493 (holding that saving clause restricted to "*this section*" did "not purport to preclude preemption of state law by other provisions of the Act") (emphasis by the Court). In *Locke* this Court emphasized that "[w]e decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106.

In deciding *Locke*, the Court reversed a decision by the Ninth Circuit declining to give preemptive effect to an earlier federal statute based on the saving clause contained in a later federal statute. *Id.*, *rev'g Int'l Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1062 (9th Cir.

1998). By construing the VRAA's general saving clause in § 1973aa-1(g) to limit the preemptive effect of the federal election day statutes, the Ninth Circuit has ignored this Court's decision in *Locke*.

4. The VRAA's General Policy Statement Does Not Have Independent Force.

The Ninth Circuit construed the VRAA's policy statement in § 1973aa-1(a)(1) that the lack of absentee voting opportunities denies citizens the right to vote in presidential elections as an affirmative limitation on the preemptive effect of the federal election day statutes. That conclusion, however, is at odds with the rules of statutory construction.

As a policy section,[3] § 1973aa-1(a)(1) has the same effect as a preamble and therefore "is not part of the substantive portion of the statute." SINGER, *supra*, § 20.12 at 97. Preambles to statutes do not impose substantive rights, duties, or obligations. *Nat'l Wildfire Fed'n v. Marsh*, 721 F.2d 767, 773 (11th Cir. 1983); *see also Ass'n of Am. Railroads v. Costle*, 562 F.2d 1310, 1318 (D.C. Cir. 1977). Thus, a preamble "cannot be given the effect of enlarging the scope or effect of a statute." SINGER, *supra*, § 20.03 at 83.

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[3] Sutherland explains that "in place of preamble, it has become common, particularly in federal legislation, to include a policy section which states the general objectives of the act so that administrators and courts may know its purposes." SINGER, 1A SUTHERLAND STATUTORY CONSTRUCTION § 20.12 at 97 (5th ed. 1991).

In sum, none of the VRAA provisions cited by the Ninth Circuit have the effect of totally repealing the federal election day statutes. The VRAA manifestly has no effect at all on 2 U.S.C. § 1 and 7, and at most creates a very limited exception to the general rule under 3 U.S.C. § 1 that voting in presidential elections must occur on federal election day.

F. The Ninth Circuit Misapplied *Foster v. Love.*

In *Foster*, this Court considered whether states could *conclude* congressional elections prior to federal election day. *See Foster*, 522 U.S. at 69 ("The issue before us is whether such an ostensible election runs afoul of the federal statute."). The question of whether states could *commence* federal elections prior to federal election day was not before the Court in *Foster* and was not explicitly or implicitly decided by *Foster*'s holding. Indeed, the Court stressed the narrowness of its holding:

> While true that there is room for argument about just what may constitute the final act of selection within the meaning of the law, our decision does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute. Without paring the term "election" in § 7 down to the definitional bone, *it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take*

> *place on the date chosen by Congress, clearly violates § 7.*

522 U.S. at 72 (emphasis added). This Court then emphasized in a footnote that "[w]e hold today only that if an election does take place, *it may not be consummated prior to federal election day.*" *Id.* at 72 n.4 (emphasis added).

The Ninth Circuit erroneously treated this careful qualification to the Court's holding as an implicit endorsement of early voting, so long as some voting occurs on election day:

> The Supreme Court has provided the device for reconciling the federal election day statute and the federal absentee voting statute: a definition of "election" that treats election day as the "consummation" of the process rather than any day during which voting takes place. Given that definition, and the force of the absentee voting statute, Oregon is in compliance with the federal election day statute. Although voting takes place, perhaps most voting, prior to election day, the election is not "consummated" before election day because voting still takes place that day.

App. 15.

Far from endorsing any election practice that provided for voting in advance of election day, so long as some voting occurs on election day, the Court in *Foster* only held that an election *prior* to election day, with no acts to

occur on election day, violated the statute. *Foster* did not decide, one way or another, whether voting in advance of election day is permissible when coupled with voting on election day.

Indeed, if anything, *Foster* contains language that supports the proposition that voting is confined to a single day. *See, e.g.*, 522 U.S. at 69-70 (noting that the federal election day statutes mandate "holding all elections for Congress and the Presidency *on a single day* throughout the Union") (emphasis added); *id.* at 71 (defining "election" as the "combined actions of *voters* and officials meant to make a final selection of an officeholder") (emphasis added); *id.* at 72 (stating that the federal election day statutes establish "a particular day as '*the day' on which these actions take place*") (emphasis added); *id.* at 73-74 (noting that legislative history of Section 7 shows congressional concern over "*distortion of the voting process*" caused by voting at different times in federal elections) (emphasis added).

II. The Circuits and Lower Federal Courts Are in Disarray over the Meaning and Effect of the Federal Election Day Statutes, this Court's Decision in *Foster v. Love*, and Whether, and to What Extent, States Must Provide for Voting on Election Day.

The Ninth Circuit is not alone in holding that federal law permits multi-day voting. The Sixth Circuit recently upheld unrestricted in-person early voting in Tennessee, and the Fifth Circuit approved a similar system in Texas. *See Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir.), *cert. denied*, 530 U.S. 1230 (2000). Although the

courts of appeals' decisions reach the same result, they are in utter disarray as to their reasoning. For example:

- The Ninth Circuit acknowledged the force of Petitioners' textual argument that 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1 limit voting to a single day.[4] The Fifth Circuit found no textual support for this argument. *See Bomer*, 199 F.3d at 776. The Sixth Circuit found the text of the federal statutes to be ambiguous and referred to the legislative history to ascertain the meaning of "election." *See Millsaps*, 259 F.3d at 541. After reviewing the legislative history, the Sixth Circuit conceded that the relevant legislative history supported the petitioners' construction of the statutes, *see id.* at 547 (recognizing that legislative history of the federal election day statutes suggests that Congress intended to establish a single day for voting), but held that it was bound by *Foster* and that *Foster* permitted early voting. *See id.* ("In light of the importance of congressional intent to preemption analysis . . ., we acknowledge that the remarks of Representative Butler and Senator Trumbell lend support to the plaintiffs' interpretation of the statute," but "we are bound by *Foster's* definition of election in these statutes.") (citations omitted).

- The Sixth Circuit found that *Foster v. Love* controls the question presented in the instant case. *Millsaps*, 259 F.3d at 547. The Ninth Circuit determined that

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[4] *Accord In re Absent Voters Law*, 80 N.H. 595, 113 A. 293 (1921) (declaring an absentee voting bill preempted by 2 U.S.C. §§ 1 and 7 and stating that " [i]f the election is to be held on a certain day, the implication is that the vote must be cast on that day.").

Foster was may *not* be controlling because it decided a different question. App. 13. The Fifth Circuit seemed to acknowledge that *Foster* is not controlling, but then interpreted *Foster*'s qualification to its holding as a "signal" to predict how this Court *would* rule. *Bomer*, 199 F.3d at 776.

- The district court in *Bomer* held that the mere tallying of votes constituted an "election" within the meaning of the federal election day statutes. *See Voting Integrity Project, Inc. v. Bomer*, 61 F. Supp. 2d 600, 604 (S.D. Tex. 1999). The district court in this case held the same with respect to 3 U.S.C. § 1. *See* App. 24. The Fifth Circuit in *Bomer* did not reject the reasoning of the district court in that case, and the Ninth Circuit in this case did not repudiate the holding of the district court in this case that voting in presidential elections can be completely decoupled from election day.

- The Ninth Circuit ultimately upheld Oregon's vote-by-mail system even though it conceded that under the Oregon system, "most voting" may take place prior to election day. App. 15. But the Fifth Circuit's decision implies that although Texas' system does not conflict with the federal election day statutes, *Oregon*'s system might be invalid because under the Oregon system, the majority of votes are cast *prior* to election day. *See Bomer*, 199 F.3d at 776 (upholding Texas system in part because the majority of votes in Texas are cast *on* election day). Meanwhile, the Sixth Circuit upheld the Tennessee system based in part on the rationale that under that system, "considerable voting continues to take place on election day itself." *See Millsaps*, 259 F.3d at 546.

This last conflict between the circuits' opinions is very significant to policymakers charged with election reform. If Maryland, for example, wanted to adopt a vote-by-mail system identical to Oregon's, should it look to the Ninth Circuit, the Fifth Circuit, or the Sixth Circuit? The Fifth Circuit upheld Texas' system in part because the majority of citizens still voted on election day. *Bomer*, 199 F.3d at 776. The implication of this reasoning is that a vote-by-mail system like Oregon's might be invalid under the Fifth Circuit's decision in *Bomer*, because eighty percent of Oregon's voters cast their ballots by mail in 2000.

Moreover, can a state comply with the federal election day statutes by eliminating voting entirely on federal election day, so long as the votes are tallied on that day? Under the district court's decision as affirmed by the Ninth Circuit, states can do just that. The result could be attempts by states to conduct presidential voting in September or October, with only vote tallying to occur on federal election day.

If States are to embark on electoral reform, they need this Court to provide a uniform answer to the question of whether federal law requires that all voting occur on a single national election day, and if not, precisely what acts must take place on that day and what acts may occur beforehand. This is precisely the circumstance in which the Court should grant the writ. *See, e.g.*, *Barrett v. United States*, 423 U.S. 212, 215 (1976) (stating that certiorari was granted because of the importance of the issue and because the court of appeals decision "appeared to have overtones of conflict" with another circuit's decision).

III. This Case Involves a Question of Exceptional National Importance.

A. Resolving This Case is Crucial for Election Reform, Especially as it Bears on Election Integrity.

This case presents the Court with the opportunity to resolve the unsettled question of whether Oregon's system of unrestricted early voting by mail is permissible under federal election law. The crucial importance of the issue in this case, especially in the wake of controversies surrounding the 2000 presidential election, was underscored recently by the release of the report of the National Commission on Federal Election Reform, which was co-chaired by former Presidents Ford and Carter. Most notably for purposes of this case, the Commission addressed "the increasing adoption of procedures that encourage 'no excuse' absentee voting, early voting, and voting-by-mail" and termed this trend troubling.[5] In particular, the Commission noted that

> *Federal law states that presidential elections should be held on the same day throughout the nation.* Courts nonetheless have understandably been reluctant to invalidate state laws on this basis. *But we believe the statutory plan offers wise guidance.*

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[5] *See* National Commission on Election Reform, *To Assure Pride and Confidence in the Election Process*, at 43-44 (released July 31, 2001). The report can be found at http://www.reformelections.org/data/reports/99_full_report.pdf.

Id. at 43 (emphasis added).

The Commission enumerated a number of concerns about unrestricted early voting, some of which are identical to those Congress cited in adopting the federal election day statutes. The Commission wrote:

- Citizens should vote with a common base of information about candidates. If they vote over a period of weeks before Election Day, they vote based on the knowledge available on a smattering of different days.

- Wherever possible, citizens should vote alone and in secret. The United States adopted a secret ballot centuries ago to help voters resist pressure to disclose their choices, whether to relatives or to interested "friends." Permissive early voting threatens the hard won right to a secret ballot.

- The institution of a national Election Day is one of the only remaining occasions in which Americans come together as a nation to perform a collective civic duty. We think rituals and ceremonies do have a part in forming a nation's traditions and habits. We think this should not be discarded lightly.

- *Growing use of absentee ballots has turned this area of voting into the most likely opportunity for election fraud now encountered by law enforcement officials.* These cases are

> especially difficult to prosecute, since the misuse of a voter's ballot or the pressure on voters occurs away from the polling place or any other outside scrutiny. These opportunities for abuse should be contained, not enlarged.

Id. at 44 (emphasis added).

This last point bears special emphasis, as it demonstrates that one of Congress's objectives in enacting the federal election day statutes – the suppression of election fraud – has been undermined by the recent emergence of unrestricted early voting, and especially early voting by mail as in Oregon.

The Commission acknowledged "how difficult it will be for states that have already adopted such practices to roll them back." However, the Commission concluded:

> We hope to do what we can to undermine the hitherto largely uncritical acceptance of this "convenient" trend and discourage states that have not yet traveled down this problematical path.

Id.

B. Unrestricted Early Voting and the Uncertainty Created by the Legal Issue in this Case Are Widespread.

The Commission's report was prepared in reaction to the many controversies surrounding the 2000 federal elections, not just in Florida but elsewhere. Commenting on those same controversies, this Court implicitly advised

"legislative bodies nationwide" to examine the processes by which citizens vote. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). But legislatures cannot reform their election laws properly unless they understand the import of existing federal election laws and decisions of this Court. As they redraft their election codes, legislatures will consider more than dangling chads and antiquated voting machines; they will consider voting by mail and other forms of unrestricted early voting. They need to know whether or not those options are permissible under 2 U.S.C. §§ 1 and 7, 3 U.S.C. § 1, and this Court's decision in *Foster v. Love*. By assessing the legality of Oregon's vote-by-mail regime, this Court can better equip the States to take on the task of election reform that the Court itself urged upon them.

Moreover, the nation's – and the Court's – painful experience with the 2000 presidential election demonstrates that legal controversies over election laws and procedures are best settled *prospectively*, before votes are cast in the heat of an election. To the extent that this issue is not settled now, the possibility remains that it will resurface sooner or later as part of a *post*-election controversy over whether votes cast early are valid and should be counted.

Although only Oregon has adopted a pure vote-by-mail system, in the last three decades[6] some eighteen other states have some form of unrestricted early voting – in other words, voting on a day other than election day

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[6] While states began to provide for civilian absentee balloting for persons unable to vote on election day in the 1890's, no state permitted unrestricted absentee balloting until the 1970's.

without having to provide a reason or justification for voting early.[7] The result is a "patchwork of state [election times], undermining the uniformity and national character that the Framers envisioned and sought to ensure." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 822 (1995). This patchwork of conflicting periods for the holding of federal elections bears out the warning of Publius that "[i]f

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[7] In addition to Oregon, unrestricted early voting exists in the following states: Alaska, *see* ALASKA STAT. § 15.20.010 (at least 15 days before election); Arizona, *see* ARIZ. REV. STAT. ANN. §§ 16-541 *et seq.* (at least 30 days before election); Arkansas, *see* ARK. CODE ANN. §§ 7-5-402, 7-5-418 (15 days before election); California, *see* CAL. ELEC. CODE § 3000 (29 days before the election); Colorado, *see* COLO. REV. STAT. ANN. § 1-7.5-108 (up to 55 days before the election); Florida, *see* FLA. STAT. ANN. § 101.657 (available to any registered voter who is "unavailable to attend the polls on election day" beginning up to 45 days before the election at the discretion of each county); Idaho, *see* IDAHO CODE § 34-1001 (at least 43 days before the election); Kansas, *see* KAN. STAT. ANN. §§ 25-119, 25-120 (20 days before election); Nebraska, *see* NEB. REV. STAT. §§ 32-808, 32-938 (at least 35 days before the election); New Mexico, *see* N.M. STAT. ANN. §§ 1-6-3, 1-6-5 (40 days before the election); North Dakota, *see* N.D. CENT. CODE § 16.1-07-01 (40 days before the election); Oklahoma, *see* OKLA. STAT. ANN. tit. 26, § 14-105 (30 to 45 days before the election); Tennessee, *see* TENN. CODE ANN. § 2-6-101 *et seq.* (20 days before the election); Texas, *see* TEX. ELEC. CODE §§ 81.001, 82.005, 85.001(a) (17 days before the election); Vermont, *see* VT. STAT. ANN. tit. 17, § 2531 (available to any registered voter who "expects to be an absent voter" for any reason at least 35 days before the election)Washington, *see* WASH. REV. CODE ANN. § 29.36.010 (45 days before the election); Wyoming, *see* WY. STAT. ANN. § 22-6-107, 22-9-101 (at least 40 days before the election).

each State may choose its own time of election, it is possible there may be at least as many different periods as there are months in the year." THE FEDERALIST NO. 61, at 413 (Alexander Hamilton) (J. Cooke ed. 1961).

As the Framers considered national uniformity in the time of federal elections to be a "positive advantage," *id.*, and as they equally feared "the States' abuse of the power to set the 'Times, Places, and Manner' of elections," *U.S. Term Limits*, 514 U.S at 808-09, they gave Congress "the final say" on the subject. *Foster*, 522 U.S. at 72. The Ninth Circuit's decision opens the door to further abuse of this power by the states and further balkanization of the timing of voting in federal elections.

This case involves an election system used, in one variation or another, by at least nineteen states. It implicates the very important federal interest of preventing fraud in federal elections and preventing state abuse of the power to set the time of federal elections.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari and resolve these critical questions.

Respectfully submitted,

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Appendix

App. 1

VOTING INTEGRITY PROJECT, INC.,
FRED DECKER, ALBERTA BRYANT,
DIANA EVANS, AND CHARLES SAUVIE,
Plaintiffs-Appellants,

v.

PHIL KEISLING,
SECRETARY OF STATE OF OREGON,
Defendant-Appellee

No. 99-35337

259 F.3d 1169

United States Court of Appeals
for the Ninth Circuit

July 11, 2001

COUNSEL: M. Miller Baker, Charles Spies, and Richard B. Rogers, Carr Goodson Warner, Washington, D.C., for the appellant.

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Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General, Salem, Oregon, for the appellee.

JUDGES: Before: Ruggero J. Aldisert,[1] Andrew J. Kleinfeld, and William A. Fletcher, Circuit Judges. Opinion by Judge Kleinfeld.

KLEINFELD, Circuit Judge.

The issue in this case is whether state legislation allowing people to vote by mail over an extended period violates a federal statute requiring that the election shall be held on a particular day.

Voting Integrity Project, Inc. and several individuals brought a federal civil rights suit for declaratoryand injunctive relief,[2] to establish that an Oregon statute that allows Oregonians to vote by mail for a substantial period prior to or as well as on this federal election day violates the federal election laws. This case concerns only legal issues, and no facts are in dispute. The State of Oregon prevailed on summary judgment.[3] We have jurisdiction under 28 U.S.C. § 1291.

I. Federal law.

Federal statutes establish "the Tuesday next after the first Monday in November" as federal election day for the election of United States Representatives and Senators and

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[1] The Honorable Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit, visiting judge.

[2] The suit is pursuant to 42 U.S.C. § 1983, which provides for suits in federal court for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

[3] *See* FED. R. CIV. P. 56.

as the day on which "electors of President and Vice President shall be appointed."[4] Without question, Congress has the authority to compel states to hold these elections on the dates it specifies. The Constitution provides that:

> the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.[5]

Likewise, "Congress may determine the Time of chusing the Electors ..." for the electoral college.[6]

Until the 1840s, Congress left the actual conduct of federal elections to the diversity of state arrangements. In 1845, Congress provided that in presidential election years "the electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November."[7] n7 Further changes for the election of Representatives, Senators and the President and Vice President were legislated as part of Reconstruction in the 1870's. Congress provided that:

> the Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of

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[4] 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. The manner of appointment is now by popular election but was formerly by the legislatures of some states.

[5] U.S. CONST. art. I, § 4, cl. 1.

[6] U.S. CONST. art. II, § 1, cl. 3.

[7] 3 U.S.C. § 1.

> the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.[8]

Senators, of course, were not covered by this election day provision, because until the Seventeenth Amendment was ratified, they were selected by state legislatures, not elected. After ratification, Congress provided that they should be elected at the same time as Representatives were elected.[9]

The law remains the same today. The first Tuesday after the first Monday in November is the day when presidential and vice presidential electors "shall be appointed,"[10] and it is also "the day for the election" of Representatives and Senators.[11]

II. Oregon law.

Oregon law provides that elections "shall be held" the first Tuesday after the first Monday for federal and other offices.[12] But citizens do not necessarily vote on that day. Oregon has adopted a novel procedure of allowing all voters to vote by mail for a substantial period before election day. Oregon law now provides that the regular biennial elections "shall be conducted by mail."[13] The statute establishes an extended period, rather than a single

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[8] 2 U.S.C. § 7.
[9] 2 U.S.C. § 1.
[10] 3 U.S.C. § 1.
[11] 2 U.S.C. §§ 1, 7.
[12] OR. REV. STAT. § 254.056.
[13] OR. REV. STAT. § 254.465.

day, during which citizens may vote. County clerks must mail the blank official ballots to all registered voters between 14 and 20 days preceding the election.[14] Voters can mail the ballots back or deposit them at any time between when they receive them and election day.[15] Mailed ballots are counted only if they are received no later than election day,[16] so the scheme contemplates that they will be mailed prior to election day. Voting by mail does not require any certification that the voter will be out of the district on voting day or will be otherwise inconvenienced or unable to vote in person.[17]

A vestige of traditional voting days remains. Voters may vote the traditional way, by casting their ballots in person at a central location on voting day if they choose.[18] The Secretary of State must designate "places of deposit" for ballots, which must be kept open on voting day for at least eight hours and at least until 8:00 P.M.[19] Voters have the right to deposit their ballots at that place instead of mailing them in.[20] In addition to depositing a ballot at a "place of deposit," any voter may obtain a replacement ballot and cast it at the county clerk's office or one central location in the electoral district if the ballot mailed to them is destroyed, spoiled, lost, or never received.[21]

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[14] OR. REV. STAT. § 254.470(3)(a)-(b).
[15] OR. REV. STAT. § 254.470(8).
[16] *Id.*
[17] OR. REV. STAT. §§ 253.015, 253.030.
[18] Or. Rev. Stat. § 254.474.
[19] Or. Rev. Stat. § 254.470(2).
[20] Or. Rev. Stat. § 254.470(8).
[21] Or. Rev. Stat. §§ 254.470(2), 254.470(9).

III. Analysis.

We review the district court's grant of summary judgment de novo.[22]

Congress, exercising its authority under the Constitution,[23] has designated the first Tuesday after the first Monday in November as "the day for the election."[24] Appellant argues that under Oregon's new vote by mail statutes, much or most of the voting for these federal officials will now take place in Oregon prior to the day Congress has designated as "the day for the election,"[25] thereby violating the federal statute.

Appellant argues that by designating a federal election day, the first Tuesday after the first Monday in November, as "the day for the election," (emphasis added), Congress implied that the designated federal elections were to take place on that day and no other days. That is a fair inference from the text. The word "the" precedes "day," implying that the statute refers to a single day. This textual argument has considerable force.

Appellant further argues that the legislative history shows that Congress meant what the text implies. This argument also has force. We have studied the Congressional Globe (an earlier analogue of today's Congressional Record) to discover "what social problem Congress addressed with this statute more than [eleven]

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[22] See *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998).

[23] U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. art. I, § 4, cl. 1.

[24] 2 U.S.C. § 7.

[25] *Id.*

decades ago."[26] We encounter all the usual problems of legislative history, such as not knowing whether those who spoke represented the views of those who did not speak. Some speakers dilute clarity with diplomacy, as can be expected of serious legislation trying to accomplish a serious purpose.

But it is plain that Congress considered and rejected the practice of multi-day voting allowed by some states. In the 1844 debates regarding selection of the electoral college, there was discussion on the floor of the Virginia practice, where "it frequently happened that all the votes were not polled in one day."[27] But the expense to some states of reforming the system was characterized as a "slight consideration in the decision of a matter of such momentous importance."[28] In the previous presidential election, "both parties [were] charging each other with having committed great frauds, and both professed to be anxious to guard against them in future."[29] It was argued that the "time must be uniform in the States."[30]

The intense 1871-72 debates became even more explicit in addressing multi-day voting. At this time, Reconstruction was drawing to an end, a federal amnesty program allowed many confederate soldiers to regain the right to vote,[31] the so-called Redeemers were winning

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[26] *Portland 76 Auto/Truck Plaza, Inc., v. Union Oil Co.*, 153 F.3d 938, 944 (9th Cir. 1998).

[27] Cong. Globe, 28th Cong. 2d. Sess. 15 (1844).

[28] *Id.* at 28.

[29] *Id.* at 29.

[30] *Id.*

[31] *See* ENCYCLOPEDIA OF AMERICAN HISTORY 250 (Richard B. Morris ed., 1953).

control of previously "reconstructed" southern states, and the Democratic Party was consequently drawing even with the Republican Party in national strength.[32] While the national election day was being considered in the House, a general amnesty bill for confederates was pending in the Senate,[33] and reapportionment of Representatives among the states was also being hotly debated.[34] The abolitionist leading debate said that the "object of this amendment is to provide a uniform time of electing Representatives in Congress."[35] He explained that a uniform day of election would address fraud "on account of the facility for colonization and repeating among the large central States, . . . the privilege is allowed the border states, in any man is so disposed, of throwing voters across from one into the other."[36] Though not mentioned during the debate, the anarchy and terrorism resulting from massive voting fraud in "Bleeding Kansas" by pro-Slavery voters from Missouri crossing the border to counter pro-abolition voters from New England could not have been so soon forgotten.[37]

At the time, different states elected members of the House of Representatives during different months.[38] Much concern was expressed about the inconvenience of changing state constitutions and laws to accommodate a

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[32] *See* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 721-22 (1965).

[33] Cong. Globe 42d Cong., 2d Sess. 620 (1872).

[34] Cong. Globe 42d Cong., 2d Sess. 608 (1872).

[35] Cong. Globe 42d Cong., 2d Sess. 112 (1871).

[36] *Id.*

[37] *See* ALBERT D. RICHARDSON, BEYOND THE MISSISSIPPI 41 (1867).

[38] Cong. Globe, 42d Cong., 2d Sess. 138 (1871).

uniform national day.[39] Some argued that the diversity of dates "gives some states undue advantage," and "it gives some parties undue advantage,"[40] though a Senator from Maine remarked "we want in the future, as we have had in the past, the position of indicating to the country the first sentiment on great political questions."[41]

Congress expressly considered an amendment to continue to allow states "in which by law the polls are held open more than one day" to continue the practice.[42] Debate focused on Texas, a state then being reconstructed. Voting was allowed in Texas only at county seats, and polls were held open for four days. The stated purpose was so that all the voters could get there and be spread out enough so that there was time to accommodate all the voters.[43] Other southern states used the same practice.[44] The proviso would have allowed the practice to continue, with the national election day being the first day of the polls being open in those states.[45] But the argument for a uniform national day kept being repeated, along the lines of: "Whenever you provide that elections shall take place upon the same day, you do interpose a not inconsiderable check to frauds in elections, to double voting, to the transmission of voters from one State to another, and you do allow the people to vote for their Representatives

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[39] *Id.* at 138-39.
[40] *Id.* at 141.
[41] *Id.* at 116.
[42] Cong. Globe, 42 Cong., 2d Sess. 676 (1872).
[43] *See id.* at 610, 676.
[44] *See id.* at 610.
[45] *See id.*

undisturbed by considerations which they ought not to take at all into account."[46]

The most explicit language about multi-day voting came in response to an argument that "it is an impossibility for the voters to all get together on one day" because" they are remote from the polls."[47] One Representative gently suggested that Texas should "have a greater number of precincts."[48] But another said that multi-day voting was a device used to disenfranchise black voters:

> I desire to say that never until there was a change in the suffragans, never until the colored people became voters, did we ever have an election held in this country continue for more than one day.
>
> ....
>
> I never knew in the western country or in the eastern country any State where an election was required to be held in more than one day. Until this new element I shall not say what entered into our politics, it was never considered necessary that four, five, or six days should be allowed for the purpose of voting. Of course in Texas they have had three days for an election; and we had a beautiful illustration of that mode of voting in the contested-election case decided here yesterday. I do not propose to legalize any such proceeding by Federal legislation.[49]

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[46] *Id.* at 618.
[47] *Id.* at 3408.
[48] *Id.*
[49] *Id.* at 3408.

Ultimately, Congress rejected the provision to allow multi-day voting to continue so long as states provided for it by law.[50] Instead, it allowed multi-day voting to continue through the election of 1872, but not thereafter.[51] n51 Because Congress considered and rejected an amendment to allow multi-day voting when they enacted the uniform election day for Representatives in 1872, it is a fair inference that the word" the" in the statute was intended, after due consideration of multi-day voting, to reject it. "Few principles of statutory intend sub silentio to enact statutory language that it has earlier discarded in favor of other language."[52]

Thus appellants have made substantial arguments from the text of the statute and the history of rejection of a bill that would have allowed multi-day voting. But there are also substantial arguments going the other way.

The Supreme Court decision most nearly on point cuts in favor of the Oregon law. *Foster v. Love* holds that a novel Louisiana scheme violates the federal election day statute,[53] but the way in which it so holds seems to imply that the Oregon statute does not. The Louisiana statute required all candidates for the United States Senate and the United States House of Representatives to run together in an open primary in October.[54] If a candidate won a

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[50] *Id.* at 676.

[51] Act of May 23, 1872, ch. CXCVII, 17 Stat. 157.

[52] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987).

[53] 522 U.S. 67, 69, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997).

[54] *See id.* at 70.

majority of the votes, that candidate was elected.[55] If no candidate won a majority, then there was a run-off on the federal election day.[56] The court held that Louisiana had provided for federal elections earlier than the federal election day, so the state law was violated by the federal statute.[57] The Court defined "election" for purposes of the federal election day statute as "the combined actions of voters and officials meant to make a final selection of an officeholder."[58] That definition cuts in favor of the Oregon law, because in Oregon the "final selection "cannot be made until the federal election day, while in Louisiana, it could be and ordinarily was made prior to the federal election day. The inference is strengthened by the Court's explanation that "it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7."[59] A footnote to this passage emphasized that "this case does not present the question whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to federal election day."[60] In contrast with the Louisiana scheme, the Oregon scheme leaves the election "unconsummated" until the federal election day, with a residual ritual of in person voting at central election offices still to take place on that day.

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[55] *See id.*
[56] *See id.*
[57] *See id.* at 74.
[58] *Id.* at 71.
[59] *Id.* at 72.
[60] *Id.* at 72 n.4.

Thus what we have so far is a statute that, taking the text and its history by themselves, seems to imply that multi-day elections are not permitted. But we have a Supreme Court decision which we must follow, explaining that the word "election" means a "consummation" of the process of selecting an official, and emphasizing that it found a violation of the statute only because there was no act of officials or voters left to be done on federal election day. The Foster definition of "election" implies that there is only a single election day in Oregon, when the election is "consummated, even though there are prior voting days. Nevertheless Foster decided a different question, so its answer may not be controlling.

What persuades us of the proper outcome in this difficult case is the long history of congressional tolerance, despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue. We find it difficult to reconcile a decision rejecting the Oregon law with the maintenance of absentee balloting.

Absentee voting began during the Civil War as a means of providing soldiers the ability to vote.[61] Vermont became the first state to accord absentee voting privileges to civilians in 1896.[62] States have continued to provide for and expand absentee voting since.

Congress has recently required, not just allowed, states to provide for absentee voting in federal elections.[63] The absentee voting required is not like Oregon's. The congressional requirement of absentee voting is limited to "duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held."[64] By itself, this provision might be taken to imply that absence from the district on the election day is a prerequisite for absentee voting. But Congress expressly prohibited that restrictive inference. It provided that "nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein."[65] The "section "referred to is 1973aa-1, which speaks to residence requirements for voting, registration, and absentee voting. The "less restrictive voting practices" allowed by the section would then include less restrictive absentee voting practices. The congressional findings of fact in the statute say that "lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections" deny or abridge citizens' rights.[66]

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[61] *See De Flesco v. Mercer County Bd. of Elections*, 43 N.J. Super. 492, 129 A.2d 38, 40 (N.J. App. 1957).

[62] *Id.*

[63] 42 U.S.C. § 1973aa-1(d).

[64] *Id.*

[65] 42 U.S.C. § 1973aa-1(g).

[66] 42 U.S.C. § 1973aa-1(a)

Thus, we have one statute that may reasonably be construed to mean that all voting in federal elections should take place on a single day. The legislative history supports that interpretation. But another statute, of equal force, plainly provides for liberality toward absentee balloting. We are under a duty to construe statutes harmoniously where that can reasonably be done.[67]

The Supreme Court has provided the device for reconciling the federal election day statute and the federal absentee voting statute: a definition of "election" that treats election day as the "consummation" of the process rather than any day during which voting takes place. Given that definition, and the force of the absentee voting statute, Oregon is in compliance with the federal election day statute.[68] Although voting takes place, perhaps most voting, prior to election day, the election is not "consummated" before election day because voting still takes place on that day.

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[67] 2B SUTHERLAND STATUTORY CONSTRUCTION § 53.01 (5th Ed.).

[68] The Fifth Circuit reached the same conclusion regarding a Texas statute that allows voting to begin 17 days before federal election day. *See Voting Integrity Project Inc. v. Bomer*, 199 F.3d 773, 774, 777 (5th Cir. 2000).

IV. Conclusion.

We take no position on the desirability of one or another scheme for voting or absentee voting, only its legality. We only conclude that the Oregon scheme is in compliance with the federal election day statute.

AFFIRMED.

VOTING INTEGRITY PROJECT, INC., ET AL.,
Plaintiffs,
v.

PHIL KEISLING,
SECRETARY OF STATE OF OREGON,
Defendant.

Civil No. 98-1372-AA

1999 U.S. Dist. LEXIS 22727

United States District Court
for the District Of Oregon

March 22, 1999

COUNSEL: John DiLorenzo, Jr., Aaron K. Stuckey, Hagen, Dye, Hirschy & DiLorenzo, P.S., Portland, Oregon, for plaintiffs.

M. Miller Baker, Brian M. Tauscher, Charles R. Spies, Carr Goodson Lee & Warner, Washington, D.C., for plaintiffs.

Patrick M. McSweeney, McSweeney, Burtch & Crump, Richmond, Virginia, for plaintiffs.

Hardy Myers, Attorney General, Stephen K. Bushong, Assistant Attorney General, Department of Justice, Salem, Oregon, for defendant.

JUDGES: Ann Aiken, United States District Judge.

AIKEN, Judge:

BACKGROUND

With the passage of Ballot Measure 60, overwhelmingly approved at the November 3, 1998 election, Oregon became the first state to adopt a vote-by-mail system for all statewide elections. For regular elections for United States Representative, United States Senator, and Presidential Elector, Oregon permits voters to cast their votes 20 days prior to the general federal election day in November ("election day"), even if such voters are able to vote on election day.

Plaintiffs are Voting Integrity Project, Inc., a nonprofit, nonpartisan public-interest corporation based in Arlington, Virginia, and several individual registered voters in Oregon. Plaintiffs move for summary judgment arguing that this early voting by voters otherwise able to vote on election day violates 2 U.S.C. §§ 1, 7 and 3 U.S.C. § 1, which establishes election day as the exclusive day throughout the United States for balloting for United States Representatives, United States Senators, and Presidential Electors. Plaintiffs also challenge Or. Rev. Stat. § 253.030(5) which allows Oregon voters to make their absentee status "permanent" until the elector notifies the clerk or is no longer an elector of the county.

Plaintiffs rely on 42 U.S.C. § 1983 for relief arguing that because defendant Keisling enforces the challenged Oregon statutes, he is subject to an injunction under § 1983. Section 1983 provides a cause of action for violations of federal statutes. *See Maine v. Thiboutot*, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980).

Defendant Phil Keisling, the Secretary of State of Oregon, moves for cross-summary judgment arguing that while Oregon may have changed the time, place, and manner in which ballots are cast, Oregon has not changed the day of the election, and therefore, has not violated federal law.

Defendant's motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied.

STANDARDS

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The materiality of a fact is determined by the substantive law on the issue. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical*, 809 F.2d at 630.

DISCUSSION

(1) Vote by Mail - Ballot Measure 60

The Elections Clause of the United States Constitution, Art. I § 4, cl. 1 establishes uniform rules for federal elections. Acting pursuant to constitutional authority, in 1945 Congress enacted 3 U.S.C. § 1, which provides:

> The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

Id.

In 1872 Congress enacted 2 U.S.C. § 7, which provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress

> commencing on the 3d day of January next thereafter.

Finally, following ratification of the Seventeenth Amendment (providing for the direct election of Senators), Congress exercised its Elections Clause authority to establish a uniform national election day for Senators:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3rd day of January next thereafter.

2 U.S.C. § 1. By linking the election of United States Senators under this section with the election of United States Representatives, Congress mandated that all elections for congressional representation be held on election day.

By state law, election day in Oregon for the regular election of Oregon's United States Representatives, Senators, and Presidential Electors occurs on the Tuesday following the first Monday in November in even numbered years. OR. CONST., Art. III, § 14; OR. REV. STAT. § 254.056.

Under Measure 60 ballots will be mailed to all registered voters in Oregon not sooner than twenty days,

and not later than fourteen days, before election day. OR. REV. STAT. § 254.470(3)(a). Each county election official is required to designate at least two official sites for ballot deposit in statewide elections. Most counties have more than the required two sites. Ballots may be returned by voters through the mail, or delivered in person, to the official site or sites for ballot deposit for each county. OR. REV. STAT. § 254.470(8). Ballots must be received at an official site for ballot deposit by 8:00 p.m. on election day in order to be processed and tallied. As written, Oregon voters may cast their votes for United States Representatives, United States Senators, and Presidential Elector, by mail or other return of their ballot, beginning twenty days before the election day, even if such voters are fully able to vote on election day.

Although ballots may be deposited at an official site for ballot deposit before election day, ballots cannot be tallied until election day, regardless of when they are deposited. Most ballots are tallied through a "vote tally system," which involves one or more pieces of equipment that examine marked or punched ballots automatically (commonly known as a "ballot counting machine"). Regardless of the system used to tally ballots, the tally cannot begin before election day. Election results cannot be released until after 8:00 p.m. on election day.

As an alternative to depositing ballots at the official site for ballot deposit, any voter may choose to obtain and cast a ballot on election day in person at the county elections office. As a result, voting "in person" on election day will still occur in Oregon under Measure 60, albeit at fewer polling places.

Plaintiffs argue that because Oregon's early voting statutes conflict with federal law, they are unconstitutional under the Supremacy Clause and must yield. The Supremacy Clause of the United States Constitution provides that "the Constitution and the laws of the United States shall be the Supreme Law of the Land." U.S. CONST. Art. VI, § 2. "If a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 15 L. Ed. 2d 194, 86 S. Ct. 258 (1965).

Plaintiffs argue that Oregon's early voting system ignores federal law's formulation for an exclusive election day, supplanting it with an extended election commencing in October (for "permanent" absentee ballots) during which voters mark and return their ballots. Plaintiffs conclude that such early voting completes, for Oregon voters, the final act of selecting an office holder, and thwarts the congressional purpose of national uniformity in the time of balloting.

I disagree. State laws are deemed to conflict with federal law, "either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives." *Northwest Cent. Pipeline v. Kan. Corp. Comm'n*, 489 U.S. 493, 509, 103 L. Ed. 2d 509, 109 S. Ct. 1262 (1989) (citations omitted). In the absence of some "conflict" state election laws are to be upheld, because states "are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives." *United States v. Classic*, 313 U.S. 299, 311, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941); *see also Smiley v. Holm*, 285 U.S. 355, 366, 76 L. Ed. 795, 52 S. Ct. 397 (1932) (constitution vests state legislatures with

"the authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of votes, prevention of fraud and corrupt practices, counting votes, duties of inspections and canvassers, and making and publication of election returns").

Federal law establishes the Tuesday after the first Monday in November as "the day for the election." 2 U.S.C. § 7. Thus, Oregon's vote-by-mail law can be found to "conflict" with federal law only if the vote-by-mail law changes the "the day for the election." With respect to presidential and vice-presidential elections, the statutory language states that "the electors" of president and vice-president "shall be appointed" on election day. 3 U.S.C. § 1. That statute on its face does not prevent voters from casting their ballots early, as long as the electors to the Electoral College are not "appointed" until election day. Because votes are not tallied until election day, "appointment" of electors cannot possibly occur in Oregon before election day.

A candidate is not "selected for office" at the time a voter deposits a completed ballot in the ballot box, regardless of whether the ballot is deposited at a polling place on election day, in the mailbox, or at an official site for ballot deposit on or before the designated day. Providing various options for the time and place of depositing a completed ballot does not change "the day for the election."

Further, the objectives of a uniform election day are still met under Oregon's vote-by-mail law. The results in Oregon cannot influence elections in other states because Oregon votes are not tallied until election day. The burden on states may actually be less if the election is conducted by mail. Plaintiffs do not allege or submit any evidence suggesting that vote-by-mail will increase the likelihood of fraudulent multiple voting. And vote-by-mail, like absentee voting, does not conflict with the primary purpose of the Elections Clause.

Plaintiffs acknowledge that Oregon's laws "contemplate holding an election on Federal Election Day[.]" Plaintiffs' Reply at p. 5. Allowing some electors to mark their ballots and deposit them in the mail or at an official deposit site before election day does not change "the day for the election." If it did, then all state absentee ballot laws would be preempted by federal law. All absentee balloting laws allow the federal election to "begin" by permitting early voting before election day. Thus, if plaintiffs are correct, not only would Oregon's vote-by-mail and absentee balloting laws be preempted by federal law, but so would the absentee ballot laws in all 50 states - not just the state laws that allow voters to cast absentee ballots without first making some showing of an inability to vote in person.

Finally, plaintiffs' reliance on *Foster v. Love*, 522 U.S. 67, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997), is misplaced. There, the Court struck down Louisiana's "open primary" statute, which resulted in the "election" of United States Senators and Representatives for Louisiana in October of a federal election year in more than 80% of the contested congressional elections since the system went into effect in 1978. 118 S. Ct. at 466. Specifically,

Louisiana's "open primary" provides an opportunity to fill the offices of United States Senator and Representative during the month of October without any action to be taken on federal election day. *Id.* (emphasis added).

The Court held,

> While true that there is room for argument about just what may constitute the final act of selection within the meaning of the law, our decision does not turn on any nicety in isolating precisely what acts a State must cause to be done on federal election day (and not before it) in order to satisfy the statute. Without paring the term 'election' in § 7 down to the definitional bone, it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7.

Id. at 467-68 (footnote omitted)(emphasis added).

The Court added, "This case thus does not present the question of whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 468 n.4. That is not the case here. Unlike *Foster*, Oregon's laws do not enable an election to be "consummated" prior to election day, "without any action to be taken" on election day. *Id.* at 466.

Further, the Court in *Foster* found it unnecessary to pare the term 'election' in § 7 "down to the definitional bone." *Id.* at 467. This court similarly finds it unnecessary and therefore declines plaintiffs' invitation to do so. For our purpose, Oregon's laws meet enough of the requirements of federal election laws so as to not violate or conflict with those laws. Specifically, there are enough acts done on election day to satisfy the requirements of federal law. See p. 5-6 of this opinion.

Unlike Louisiana's system in Foster, elections for federal office under Oregon's vote-by-mail system are not "concluded as a matter of law" or "consummated" before election day. To the contrary, elections under Oregon's vote-by-mail law are concluded as a matter of law on election day.

(2) Absentee Voting - Or. Rev. Stat. § 253.030(5)

Plaintiffs find similar fault with Or. Rev. Stat. § 253.030(5) which allows voters to cast votes for United States Representative, United States Senator, and Presidential Elector earlier than election day. Or. Rev. Stat. § 253.015 states, "An elector may become an absent elector when the elector has reason to believe that the elector will be unable for any reason to vote at the election." *Id.* At the voter's option, Or. Rev. Stat. § 253.030(5) makes the absentee status permanent, even if the voter is otherwise able to vote on election day: "If an elector desires, the elector's application shall be valid for every subsequent election until the elector otherwise notifies the clerk or is no longer an elector of the county." *Id.* Plaintiffs are not challenging Or. Rev. Stat. § 253.015, which permits absentee balloting in advance of the election by voters who certify their belief that they will be

unable to vote on election day, nor do plaintiffs challenge Oregon's statutes permitting absentee balloting by "long term absent electors." *See* Or. Rev. Stat. § 253.500 *et seq.*

The absentee ballot law, Or. Rev. Stat. § 253.030(5), does not conflict with federal election laws. An elector's application for an absentee ballot effectively certifies the elector's "belief" that he or she will be "unable" to vote in person. Section 253.030(5) merely continues that certification as presumptively effective for subsequent elections unless the elector decides otherwise. The reason the voter believes he or she will be unable to vote in person does not matter. A voter may thus be "unable" to vote in person if the voter chooses not to do so. Thus, plaintiffs' attempt to distinguish between Or. Rev. Stat. § 253.015 (which they do not challenge) and Or. Rev. Stat. § 253.030(5) is unfounded. Both statutes effectively signify the elector's belief that he or she will be unable to vote in person on election day.

Further, nothing in federal law limits absentee voting to persons who can make some showing of an inability to vote at the polling place on election day. Specifically, I find no such requirement in 2 U.S.C. §§ 1, 7 or 3 U.S.C. § 1.

In sum, I find no conflict between Or. Rev. Stat. § 253.030(5) and federal election [*16] laws. It is not "impossible" to have an election day while also allowing voters to vote by absentee ballot for any reason whatsoever. Doing so is not an "obstacle" to the accomplishment of the objectives of the Elections Clause and the federal election laws.

CONCLUSION

I agree that this court is not the appropriate forum to debate the policy reasons for and against Oregon's election laws. Instead, the issue is a narrow one, whether federal law preempts the challenged Oregon statutes. The matter is one of legal interpretation and definition. I find no conflict between either Oregon's vote-by-mail law or its "permanent" absentee statute and federal election statutes. The voting laws at issue here do not make it impossible to comply with federal law as they do not change "the day for the election." Election day will still occur in Oregon on the Tuesday after the first Monday in November. Polling places will still be open across the state until 8:00 p.m. on that day. Voters can still cast their ballots in person on election day. Votes will still be tallied on election day, and not before. In short, Oregon's laws have not changed the "day of election."

Further, Oregon's laws do not subvert any of the purposes of the federal election laws, which ensure that the election results from one state do not influence elections in other states, preventing voters from voting twice in the same election, and avoiding the burden of requiring states to hold multiple elections in a single election year.

Plaintiffs' motion for summary judgment (doc. 7) is denied, and defendant's cross-motion for summary judgment (doc. 17) is granted. This case is dismissed and all pending motions are denied as moot.

Dated this 22 day of March 1999.

Ann Aiken
United States District Judge

JUDGMENT

This action is dismissed.

(2)

No. 01-732

Supreme Court, U.S.
FILED
MAR 15 2002
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 2001

Fred Decker, Alberta Bryant, Diana Evans and Charles Sauvie,

Petitioners,

v.

Bill Bradbury, Secretary of State of Oregon,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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3188

QUESTION PRESENTED

Oregon's early voting statutes permit voting to begin not sooner than 18 days before federal election day, allow voting to continue through the close of the polls at 8 P.M. on election day, do not allow votes to be counted before election day and do not allow results to be announced until after the polls close on election day. Do these statutes violate federal statutes that specify a single, uniform day for conducting federal elections and that address voting in those elections?

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SUMMARY OF ARGUMENT

In attacking Oregon's statutes that permit voting in advance of federal election day, petitioners argue that, except where Congress has required otherwise, *all* voting in federal elections must take place *on* that single day. In advancing this argument, petitioners attempt to rely on federal law addressed to the timing of federal elections and downplay or ignore other federal statutes addressed specifically to *voting in* federal elections. They take this approach because federal laws addressed to voting in federal elections do not conflict with Oregon's early voting statutes.

The federal law on which petitioners rely is an 1872 statute that, in conjunction with other statutes, provides that there shall be a uniform day throughout the country for holding the election for the offices of congressional representative, senator, and President and Vice President. That statute does not mention "voting" in those elections, let alone proscribe voting prior to election day. Nevertheless, petitioners argue that the term "election" is synonymous with "voting," and that because Congress has limited the federal election to a single day, necessarily it also has limited voting to a single day. Petitioners also resort to the statute's legislative history to argue that, indeed, this 130 year-old statute was intended not only to make uniform the day of the federal election but to restrict all voting to that day.

Every federal court that has considered petitioners' claim, including three circuit courts of appeal, has rejected it. While the analyses in these cases are not identical, they are similar to and certainly not inconsistent with one another. Moreover, they lead to the correct result. Petitioners' efforts to create a significant conflict among the circuits on the question of the validity of state early voting statutes, while creative, are simply unavailing.

The thrust of petitioners' argument on the merits is that state laws permitting early voting — including absentee voting (except as *mandated* by federal legislation) — conflict with the federal legislative design and are simply poor policy. But petitioners cannot seriously argue that all early voting in federal elections conflicts with federal policies or goals or the means Congress has selected to achieve those policies or goals. Since 1970, Congress has mandated that States allow at least some voters to vote absentee in presidential elections and has expressly stated that its mandate is not a limitation on the ability of states to go further than Congress's mandate. More recently, Congress has expressly acknowledged and relied upon state absentee voting procedures to expand absentee voting for other groups (*e.g.* handicapped and elderly voters) in *all* federal elections, not just in presidential elections.

State practices allowing unrestricted absentee voting and providing for other forms of early voting do not conflict with the federal legislative design but are consistent with that design, at least as Congress shaped it in the last half of the Twentieth Century. Whether States have gone too far and the federal legislative design should be modified to curb state voting practices in federal elections are arguments that should be made to Congress and left with that body to resolve, not this Court. Indeed, as petitioners acknowledge, Congress has been apprised of concerns raised in some quarters about states' early-voting practices. And both chambers of Congress have voting reform legislation under active consideration. Congress, not this court, is the appropriate venue in which the policy merits and demerits of early-voting practices and absentee voting in federal elections should be debated. This is particularly so, respondent submits, where petitioners' legal argument asks this court to give expansive voice to the remarks of a few congressmen expressed over a century ago, while rendering mute Congress' relatively recently expressed

desires to facilitate, rather than restrict, voting in federal elections. This court should deny petitioners' petition for writ of certiorari.

REASONS WHY CERTIORARI SHOULD BE DENIED

A. The analyses of the circuit courts upholding early-voting statutes, while somewhat different, do not conflict. In any event, they give rise to no significant federal concern that would justify this Court's intervention.

Petitioners assert that the circuit courts of appeal that have considered and upheld the validity of early-voting statutes are in "utter disarray as to their reasoning." Pet. 28. That is hardly the case. First, the question before each court was virtually identical: whether Congress, in specifying a single, uniform day for holding federal elections, also intended to require that all voting occur on that day. Second, each court considered essentially the same sources in arriving at its conclusion: the federal election day statutes and the legislative history of the 1872 statute[1]; this Court's decision in *Foster v. Love*, 522 U.S. 67 (1997), and the definition of election used by the court in resolving the question presented in that case; the

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[1] The 1872 statute, codified at 2 U.S.C. section 7, provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, *is established as the day for the election*, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

As this Court explained in *Foster v. Love*, 522 U.S. 67, 69-70 (1997),

> [t]his provision, along with 2 U.S.C. section 1 (setting the same rule for electing Senators under the Seventeenth Amendment) and 3 U.S.C. section 1 (doing the same for selecting presidential electors), mandates holding all elections for Congress and the Presidency on a single day throughout the Union."

prevalence and historical practice of early voting by absentee in all states; and Congress' express recognition of, reliance on, and efforts to broaden and expand the opportunities for early voting by absentee in federal elections.[2] Granted, one can argue that each court was persuaded by somewhat different arguments or authorities in concluding that Congress did not intend to restrict all voting to election day itself. But the differences are minor and in any event would not, respondent submits, result in different outcomes among the circuits had they considered early-voting statutes other than the ones that were before them. In other words, contrary to petitioners' argument, there is nothing in the Fifth Circuit's analysis, for example, that reasonably would suggest that that court would have reached a different result had it had before it Oregon's or Tennessee's early voting statutes rather than those of Texas.

1. Overview of circuit court decisions

a. *Bomer*

In *Voting Integrity Project, Inc., v. Bomer*, 199 F.3d 773 (5th Cir.), *cert den* 530 U.S. 1230 (2000), the first of the three circuit court decisions, the Fifth Circuit considered the validity of Texas' early-voting statutes, which allowed voting to begin 17 days before federal election day. The court first turned to this Court's decision in *Foster* for guidance as to the meaning of "election" as used in the federal election day statutes.

> In striking down Louisiana's open primary statute, the Supreme Court held only that elections must not be

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[2] In *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001), discussed *infra*, the Sixth Circuit did not discuss Congress' efforts to mandate and expand absentee voting in federal elections, but did acknowledge state absentee voting practices and the effect petitioners' arguments would have on those practices.

"consummated" before federal election day. *Id.* at 72, n. 4.[3]

199 F.3d at 775. The Fifth Circuit then concluded that Texas' early-voting statute satisfied this test "[b]ecause the election of federal representatives in Texas is not decided or 'consummated' before federal election day. . ." *Id.* at 776. The court next addressed appellant VIP's contention that *Foster* was not controlling because that case dealt "not . . . with voting that began too early but with voting that ended too early." *Ibid.* Significantly, the court did not disagree with VIP's contention. Rather, the Fifth Circuit concluded that this Court "would not alter its definition of 'election' to require that states begin their federal election on federal election day," and set out several reasons for that conclusion. *Ibid.*

The first reason cited by the Fifth Circuit was that the plain language of the statute did not require all voting to occur on federal election day, only that the election be held that day. 199 F.3d at 776. Second, it was not inclined to give a "hypertechnical meaning" to the term "election" when this Court had declined to do so in *Foster*. *Ibid.* Third, it interpreted *Foster* as sending a "clear signal" that some acts associated with holding an election could be done in advance of election day without offending the federal statutes. *Ibid.* Fourth, it did not believe Congress would have permitted States to engage in the practice of absentee voting — a practice that necessarily was impermissible under VIP's interpretation of the federal-election statutes — over so long a period of time if Congress had attached the meaning to "election" VIP advocated. *Ibid.* Fifth, the court was persuaded, based on the voting rights

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[3] Under Louisiana's open primary system, a candidate receiving more than 50 per cent of the votes in the primary was "elected" and nothing further was required to be done — by candidates or election officials — on election day. *Foster*, 522 U.S. at 73.

acts,[4] that not only did Congress acknowledge and look "with favor" upon absentee voting, it "*required* absentee voting in certain circumstances." *Id.* at 776–77 (emphasis in original).

Finally, the court was convinced, based on an examination of legislative history, that the 1872 statute "reflects Congress's concern that citizens be able to exercise their right to vote" rather than a congressional effort to "imped[e] citizens in exercising their right to vote." *Id.* at 777. The court, quoting *Foster*, noted that Congress had identified two "primary evils" to which the 1872 statute was addressed:

> "distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and . . . the burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years. . ." *Foster*, 522 U.S. at 73.

Ibid. The court concluded that neither of these purposes was in any way threatened by Texas's early-voting statutes. Texas law forbade elections officials from revealing any election results before close of the polls on election day, thus avoiding the problem of distortion. *Ibid.* And Texas's voting statutes facilitated citizens' efforts to vote by giving them more voting opportunities. *Ibid.*

b. *Keisling*

In the present case below, *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001),[5] the Ninth Circuit

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[4] The court's opinion referenced three congressional acts: the Voty Rights Act Amendments of 1970, 42 U.S.C. § 1973aa–1; the 1984 Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. § 1973ee *et seq*; and the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. § 1973ff *et seq*.

considered, and rejected, petitioners' challenge to Oregon's early-voting statutes that permit voters to cast ballots not sooner than 18 days before the election.[6] The Ninth Circuit began its opinion by discussing the arguments favoring plaintiffs. It noted that there was "considerable force" to VIP's textual argument that Congress, by designating a specific day as "the day for the election," "implied that the designated federal elections were to take place on that day and no other days." App. 6. It also noted that there was "force" to VIP's argument that the legislative history demonstrated that Congress intended what the text implied. App. 6. Focusing specifically on whether Congress intended to limit voting to a single day, the court gave weight to Congress's rejection of a proposal to allow some states to engage in multi-day (post election day) voting. App. 7. One State, Texas, had argued that keeping the polls open for several days after election day was necessary due to the long distances voters would have to travel to reach the polls.[7] Because Congress ultimately rejected the multi-day voting proposal, but allowed it to continue through the 1872 election, the court deemed it a "fair

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[5] Petitioners set out the reason for the change in the caption in this Court at page ii of their petition.

[6] Under Or. Rev. Stat. § 254.470(3)(a), ballots are required to be mailed to all registered voters not sooner than 18 days, and not later than fourteen days, before election day. Ballots may be returned by mail or deposited at one of the official sites for ballot deposit, but they must be received by election officials by 8 P.M. on election day. Or. Rev. Stat. § 254.470(8).

[7] The Ninth Circuit cited remarks of congressmen opposed to this practice. One argument was that a single election day would "interpose a not inconsiderable check to frauds in elections, to double voting" and allow voters to be "undisturbed by considerations which they ought not to take into account at all." App. 9–10. The second, in direct response to the multi-day (post election) day voting proposal, was that "it had never been considered necessary that four, five or six days should be allowed for the purpose of voting." App.10.

inference" that Congress intended to reject multi-day voting. App. 11.[8]

To test that inference, the court looked to factors that might cause it to conclude that Congress had not rejected the idea of multi-day voting — at least multi-day voting that preceded, rather than followed, election day. As did the Fifth Circuit, the court looked at this Court's definition of "election" in *Foster* and concluded that it "cut in favor" of allowing pre-election day voting. App. 11. This Court's definition — "the combined actions of voters and officials meant to make a final selection of an officeholder"—favored Oregon's law because "the 'final selection' cannot be made until the federal election day, while in Louisiana it could be and ordinarily was made prior to the federal election day." App. 12. As had the Fifth Circuit, the court referenced this Court's statement in *Foster* that "if an election does take place, it may not be consummated prior to federal election day." App. 12. The court concluded that Oregon's voting statutes did not result in consummation of the election prior to federal-election day. App. 12. But the court recognized that because *Foster* decided a different question, "its answer may not be controlling." App. 13.

The Ninth Circuit then turned to what it believed determined that the federal statutes did not prohibit voting in advance of election day:

> What persuades us of the proper outcome in this difficult case is the long history of congressional tolerance,

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[8] The court had prefaced this discussion with the observation that, in analyzing legislative history, the court encounters problems of "not knowing whether those who spoke represented the views of those who did not speak." App. 7. The court thus deemed the "inference" to be derived from the legislative history only a "fair" one, rather than a more forceful one.

> despite the federal election day statute, of absentee balloting and express congressional approval of absentee balloting when it has spoken on the issue. We find it difficult to reconcile a decision rejecting the Oregon law with the maintenance of absentee balloting.

App. 13. As had the Fifth Circuit, the court specifically noted that in the Voting Rights Act Amendment of 1970, 42 U.S.C. § 1973aa–1, Congress expressly both had determined that absentee voting in presidential elections was inadequate in some cases to safeguard citizens' constitutional rights, and had mandated by law that states allow absentee voting in presidential elections in accordance with requirements Congress specified. App. 14.

The court thus found itself confronted with federal statutes, one of which could be construed to prevent voting other than on election day, and the other of which clearly required absentee voting. App. 15. Given its obligation to harmonize those statutes, the court returned to this Court's definition of "election" in *Foster* as providing the "device" that accomplished the necessary result.[9] App. 15.

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[9] Harmonizing the statutes to allow voting prior to election day did not do violence to the legislative history of the 1872 statute. While the 1872 Congress rejected multi-day voting *post election* — voting that would start on election day and continue for days thereafter — it is not clear that Congress also intended to preclude pre-election-day voting. No congressman actually mentioned disallowing multi-day voting that preceded election day and ended on election day. Whether one may infer that Congress would have been concerned about pre-election-day voting as well is not at all clear because the legislative history is silent on that subject. Thus, this Court's definition of "election day" as the day the selection of an officeholder is consummated — a definition that forecloses post-election-day but not pre-election-day voting — truly does harmonize all the federal statutes and does so in a non-offensive way.

In effect, then, the Ninth and Fifth Circuits, without exactly mirroring each other's opinions, followed a distinctly similar path to the conclusion that early voting did not violate federal law. The Fifth Circuit believed that this Court would employ the definition of election in *Foster* were it confronted with an early-voting case. For basically the same reasons expressed by the Fifth Circuit, the Ninth Circuit also concluded that Congress did not intend to prohibit early voting per se.

c. *Millsaps*

The Sixth Circuit's decision in *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001), decided less than a month after *Keisling*, upheld Tennessee's early-voting statutes that allowed voting to begin 20 days before federal-election day. The Sixth Circuit began by examining the legislative history of the 1872 election-day statute, concluding as had the Fifth Circuit in *Foster v. Love*, 90 F.3d 1026 (5th Cir. 1996), that in passing this statute,

> Congress wanted to prevent States that voted early from unduly influencing those voting later, to combat fraud by minimizing the opportunity for voters to cast ballots in more than one election, and to remove the burden of voting in multiple elections in a single year.
> * * *

259 F.3d at 541. The court summarized and quoted the comments from three congressmen addressed to the 1872 statute, the proposed amendment that would have authorized states conducting their elections on multiple days beyond election day to continue to do so, and the amendment that authorized voting to continue after election day in the 1872 presidential election. *Id.* at 541–43.

The court, however, drew no immediate conclusions from this legislative history. Instead, it shifted its focus to plaintiffs' arguments that were based on their interpretation of

Foster. 259 F.3d at 543. The thrust of plaintiffs' arguments was that an "election within the meaning of the federal elections statutes means 'the process of voting by the electorate at large to select an officeholder.'" *Ibid.* Because the process of voting occurs on more than one day, election day, and the federal statute limits the election to a single day, plaintiffs argued that the Tennessee statutes violate federal law. *Ibid.*

The court reviewed *Foster* and then rejected plaintiffs' definition of election. It agreed that *Foster* "provided guidance" on the meaning of "election" as used in the federal election statutes. 259 F.3d at 543. However, the Sixth Circuit focused on this Court's statement that the term "election" was intended to "'refer to the *combined actions of voters and officials meant to make a final selection of an officeholder.*'" *Millsaps*, 259 F.3d at 543 (quoting *Foster*) (emphasis 6th Circuit's). Louisiana's election process, the Sixth Circuit observed, violated federal law because "no action at all" occurred on the day set aside for the election. *Ibid.* The Sixth Circuit also quoted *Foster's* oft repeated footnote that "'if an election does take place, it may not be consummated prior to federal election day.'" *Id.* at 544.

The Sixth Circuit then examined the district court's opinion. The court noted that the district court, like the Fifth and Ninth Circuits, had "deferred to the authority of *Foster*" and "refused to accept arguments that they took to require striking down absentee voting statutes by implication." 259 F.3d at 545. The Sixth Circuit viewed the Fifth and Ninth Circuit decisions as upholding early-voting statutes in part because those statutes facilitated rather than hindered voting, and thus were compatible with the federal statutes. *Ibid.*

The Sixth Circuit returned to *Foster* and analyzed the early-voting statutes and plaintiffs' arguments under that decision. The Sixth Circuit found no support in *Foster* for

plaintiffs' contention that marking ballots and tendering them to election officials satisfied *Foster's* definition of election and, thus, were acts that must occur on election day. 259 F.3d at 545. Nor did the court agree with plaintiffs that the mere receipt of ballots by public officials prior to election day result in the "final selection." Rather, "final selection," the court said, requires the completion of several additional acts, all of which occur after ballots are received. Thus, receipt of ballots, "without more, is not an act meant to make a final selection." 259 F.3d at 545–46. The receipt of ballots, standing alone, is therefore not an "election," and need not occur on the day set aside for the election. The Sixth Circuit stressed *Foster's* "narrow holding suggest[ing] that, so long as a State does not conclude an election prior to federal election day, the State's law will not 'actually conflict' with federal law." *Id.* at 546.

The court also rejected plaintiffs' attempt to "raise the specter" that, interpreting federal law to prohibit only concluding an election before election day would permit states to "manipulat[e] federal elections" by "schedul[ing] voting to occur at times entirely removed from federal election day and simply counting ballots on the first Tuesday after the first Monday in November. . ." *Ibid.* This case, the court noted "does not present such a scenario" because "Tennessee's statute requires substantial official action on the congressionally prescribed day, and considerable voting continues to take place on election day itself." *Ibid.*

The court similarly disposed of plaintiffs' *expressio unius est exclusio alterius* argument. Plaintiffs argued that Congress had specified a single day as the day for the election, that the term "election" includes voting, and thus voting must occur on the day designated for the election. The court noted plaintiffs' reliance on the legislative history as support. But the court viewed *Foster* as "foreclos[ing]" plaintiffs' argument:

> So long as no combined action occurs on any day other than federal election day, or so long as any such combined action is not intended to make a final selection of a federal officeholder, a State has complied with the federal elections statutes. Put another way, the plaintiffs' argument assumes the answer to the question presented by this case, namely the statutory meaning of an "election" under federal law. *An "election" under the federal statutes requires more than just voting, and the Early Voting Statutes do not create a regime of combined action meant to make a final selection on any day other than federal election day.*

259 F.3d at 547 (emphasis added).

Addressing the legislative history, the court observed that this Court in deciding *Foster* was well aware of that same history and yet had defined election as "'the combined actions of voters and officials meant to make a final selection of an officeholder.'" 259 F.3d at 547. But the court also noted its agreement with other courts that the "practical effect" of accepting plaintiffs' argument would be a "declaration that federal law preempts a widely accepted and long-standing electoral practice," namely, absentee voting. *Ibid.* The court did not agree with plaintiffs that recognizing an exception for absentee voting from the single-day voting requirement could be upheld on the basis that such voting would be but a *de minimis* deviation and one that could, therefore, be ignored. *Id.* at 548. The court expressed its unwillingness to accept the "grave implications of the plaintiffs' arguments." *Ibid.*

Finally, the Sixth Circuit concluded that upholding early voting did not actually conflict with the means — a uniform election day — that Congress chose to achieve its objectives. First, the court concluded that requiring all voting to occur on election day was not necessary to achieve Congress' multiple

objectives. 259 F.3d at 548. Those objectives were to prevent early elections from influencing later elections in other states, to reduce the burden on citizens of having to vote in multiple elections in a single year and to prevent election fraud in the "narrowest sense, that of voting in federal elections held in more than one state." *Id.* at 548–49. Allowing early voting did not "stand as an obstacle to substantial achievement of those goals." *Id.* at 549. Second, the court observed that if it were to accept that Congress chose a single day of voting as the means to combat voter fraud, then States would be prevented from being able to adopt other means of addressing voter fraud. *Ibid.* The court was unwilling to ascribe that intent to Congress:

> Just as the plaintiffs' position asks too much because it cannot in a principled fashion distinguish absentee voting, so too the plaintiffs cannot seriously contend that Congress intended the federal election statutes to preempt additional State measures designed to protect against fraud. We decline to accept an argument that would negate the ability of the States to guard against fraud in the exercise of the fundamental right of voting.

Ibid. The court concluded by saying that the "Tennessee law interacts with federal law to form a harmonious system for the administration of federal elections, at least so far as their timing is concerned." *Ibid.*

2. The circuit courts' analyses do not conflict.

The circuit courts in *Bomer, Keisling and Millsaps* all considered the following sources: 1) the text of the 1872 statute; 2) the statute's legislative history; 3) this Court's decision in *Foster*; and 4) longstanding state absentee voting practices. *Bomer* and *Keisling* also stressed Congress's acquiescence in, support for, and, as to some voters in presidential and vice-

presidential elections, the mandate for absentee voting at the state level. Granted, the courts did not give the same weight to each of these sources, nor did the courts consider them in the same order. But at least three common analytical threads emerge:

> 1) By establishing "the" day for federal elections, the text of the statute implied at least that Congress intended to have only a single day for federal elections. Beyond that, the meaning of "election" was not clear.
>
> 2) *Foster* was at least instructive on the issue because it defined an election to require more than just voting—and more than just official action. An election was the "combined action of voters and officials meant to make a final selection of an officeholder." Under that definition, an election did not occur before election day just because voters were allowed prior to election day to deposit their ballots with election officials.
>
> 3) Plaintiffs' argument would mean the invalidation of all absentee voting in the country, except as to that which Congress mandated be allowed to take place in elections for President and Vice President.

These common threads are interwoven in the courts' decisions. The analyses do not conflict.

3. The circuit courts' decisions will not open the floodgates to ill-conceived early voting statutes and do not create confusion and uncertainty in this area.

Not only are the analyses in the three cases — and the results reached — consistent, the analyses contain no suggestion that other early-voting statutes, varying materially from

those before the courts, would also be deemed consistent with federal law. Nothing in these opinions reasonably supports petitioners' argument that an early-voting statute that required all voting to end before election day, leaving only vote-counting to be done on election day (Pet. 30), would pass federal-conflict scrutiny. Indeed, the Sixth Circuit expressly refused to consider that "specter," noting simply that in Tennessee's system, substantial official action and considerable voting still took place on election day.

Under Texas's and Oregon's early voting systems, as under Tennessee's, substantial official action and considerable voting take place on federal-election day. But what is probably more significant than the amount of voting that actually takes place on election day is that the statutes require that the polls be open on election day, thus allowing voters to vote up to the time the polls close on that day.[10] Also significant is that vote counting does not begin until election day. States considering permissive early-voting statutes like those in Texas, Tennessee, or Oregon simply do not need this Court to straighten out the law in this area. The analyses used by the circuit courts create no confusion or uncertainty as to what other States may do with similar early-voting statutes.

The only uncertainty that may exist is how these or other courts might decide a case involving a materially different early-voting system — one for example that terminated voting before election day, or that allowed voting to start months before federal election day, or one that began counting votes as they came in before election day. But uncertainty as to how a

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[10] Respondent submits that the constitutionality of two states' virtually identical voting systems should not hinge on the fact that only a small percentage of voters vote on election day in one State, while in another State, a large percentage of votes are cast on election day. What should be significant, rather, and what is present here is that the polls are open on election day and accessible to the voters.

court would rule in a case involving materially different facts inheres in the judicial process. Suffice it to say that in the case before this Court, the polls remain open on election day, but not thereafter, and votes are not counted until election day. This Court may, if necessary, address the validity of a materially different early-voting system if and when it is enacted.

B. Petitioners' attack on the Ninth Circuit's decision is flawed in several respects.

1. Petitioners mischaracterize the Ninth Circuit's decision.

Petitioners characterize the Ninth Circuit as having concluded that the 1872 statute was intended to limit voting to a single day — federal-election day. Pet. 10, 20. From this premise, they then argue, *inter alia*, that the Ninth Circuit erred in concluding that subsequent congressional acquiescence in absentee voting and the congressional mandate that absentee voting be allowed in presidential and vice-presidential elections — at least as to some voters — effected an implied repeal of the 1872 ban on all early voting. Pet. 18–25.

Petitioners' characterization is wrong: the Ninth Circuit did not conclude that Congress, in enacting the 1872 statute, intended to limit voting to election day.[11] The most that the

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[11] As discussed *supra*, p. 7, the court said that the text of the statute lent "considerable force" to petitioners' argument that the 1872 Congress intended to limit federal election day to a single day. App. 6. Respondent has always agreed. The court also concluded that there was "force" to petitioners' argument that the legislative history supported that interpretation, *i.e.*, that Congress intended to limit federal election day to a single day.. *Id.* Again, respondent agrees. Thus, the Ninth Circuit's "force" statements were in reference to Congress' intent that the *election* be confined to a single day and not, as petitioners represent, to the argument that Congress intended to confine *voting* in federal elections to a single day.

Ninth Circuit said about voting in reference to the 1872 statute was that it was a "fair inference" that Congress, in rejecting a proposed amendment that would have allowed multi-day voting beyond the 1872 election, rejected the notion of multi-day voting. App. 11. The court then said that petitioners had made "substantial arguments" based on the text and legislative history. App. 11. But the court did not conclude that Congress in fact, in passing the 1872 statute, intended to limit voting to a single day, or more specifically, to prevent all voting in advance of federal-election day.

2. Petitioners' arguments assume the answer to the question presented.

In addition to mischaracterizing what the Ninth Circuit held or concluded in this case, many of petitioners' arguments assume the answer to the very question this case poses: whether Congress intended to limit all voting to election day. Their argument, for example, that Oregon's statutes are preempted by federal law (Pet. 16) assumes that Congress chose "single-day voting" as the method to combat election fraud. Their "canons of statutory construction" argument (Pet. 17–18) is based on the premise that election day is the day Congress designated for all voting to occur. Petitioners' "presumption against implied repeals" argument (Pet. 19–25) is based both on their erroneous statement that the Ninth Circuit concluded that the 1872 statute intended to limit voting to a single day, and their assertion that it does.

3. The Ninth Circuit's analysis is not inconsistent with *Crosby* or *Locke*.

Petitioners contend that the Ninth Circuit's decision conflicts with two recent preemption decisions of this court — *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) and *United States v. Locke*, 529 U.S. 89 (2000). Petitioners argue that the Ninth Circuit ignored the teachings of *Crosby* by "attaching significance to Congress's failure to

by "attaching significance to Congress's failure to expressly preempt absentee and early-voting systems of which it was aware." Pet. 18. They also argue that the Ninth Circuit violated *Locke* by giving expansive scope to a savings clause contained in Section 1973 aa–1(g). Pet. 23–24.

Petitioners' *Crosby* argument is based on a misstatement of what the Ninth Circuit said. The court did not discern congressional intent from Congress's failure expressly to preempt state early-voting laws. Rather, the court deemed significant "express congressional approval" of absentee voting "when [Congress] has spoken on the issue." App. 13. At most, *Crosby* suggests that congressional inaction in response to state laws is a weak reed on which to base a conclusion that Congress thereby approved of those laws. *Crosby* is thus inapposite here because the Ninth Circuit relied on congressional action affirmatively expressing approval of and relying on those state laws.

Locke is distinguishable from this case. In *Locke*, this Court had to interpret the scope of two "savings" clauses contained in one title of a multi-titled, multi-subject, preemptive congressional act. The savings clauses allowed states to impose liability for oil pollution, the same subject addressed by the title of the act in which the savings clauses appeared. The question was whether Congress intended that the savings clauses re-vest States with regulatory authority as to other subjects that Congress had, in the other titles of that act and in another act, clearly foreclosed. Against the backdrop of a pervasive federal regulatory scheme, this Court concluded that Congress intended only to re-vest States with regulatory authority as to the specific subject matter addressed by the title of the act that contained the savings clauses. 529 U.S. at 106. This Court was simply unwilling to assume that Congress had, in this indirect manner, intended to re-vest States with broad regulatory authority. *Ibid.*

In the present case, of course, there is no pervasive regulatory scheme, at least none pre-dating 1970, governing the subject of voting in federal elections. Moreover, were petitioners correct that the 1872 statute did address voting, then *Locke* is inopposite. Here, the federal statute containing the savings clause (42 U.S.C. section 1973aa–1) and the 1872 statute would address the same subject-voting. In *Locke*, by contrast, the title containing the savings clause and the statutes to which the state attempted to have the savings clause apply addressed different subjects. The indirection of which this court was concerned in *Locke* simply is not present in this case.

Moreover, the Ninth Circuit did not, as petitioners assert, rely on the savings clause itself "to limit the preemptive effect of the federal election day statutes." Pet. 24. Rather, the court used the savings clause to interpret the statute in which it appeared – 42 U.S.C. section 1973aa. The court was addressing the argument that Congress, in section 1973aa, may have intended only to allow absentee voting for those voters physically absent from the State. App. 14. But the savings clause — providing that "nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein" — dispelled any suggestion that Congress intended such a limitation. App. 14. Thus, the Ninth Circuit's reliance on the savings clause here was for a very different purpose than its reliance on the savings clause with which this Court found fault in *Locke.*

4. Congress's usage of the term "election" defeats petitioners' textual argument.

Petitioners further argue that "there can be no dispute that the plain and ordinary meaning of the word 'election' means *voting* to select an officeholder," and that, therefore, "the fed-

eral election day statutes mean 'voting' when they refer to 'election.'" Pet. 17. Petitioners' argument relies on dictionary definitions which they assert demonstrates that "election" is synonymous with "voting." Pet. 17.

Respondent disagrees that these definitions suggest that the act of voting, without more, makes an election. But what is more significant is that Congress has not used "election" in that sense. In the Voting Rights Act Amendments of 1970, 42 U.S.C. § 1973aa, Congress, *inter alia*, imposed uniform national rules for absentee voting in elections for President and Vice-President. In section 1973aa–1(d), Congress required that

> each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefore not later than seven days immediately prior to such election *and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.*

(Emphasis added). In this statute, Congress makes it plain that the "day of the election," in reference to federal-election day, is not the day all votes are cast. A person is entitled to vote by absentee ballot provided the person applies for a ballot at least seven days before the "election" and returns the ballot "not later than the time of closing of the polls . . . on the day of such election." Thus, Congress clearly contemplated and envisioned that voters would complete the act of voting prior to the day of the federal election. Congress has not, therefore,

used the term "election" to mean the day that all voting is to occur.

That Congress has not intended voting, standing alone, to constitute an "election" is also apparent from other federal statutes that address, but do not mandate, absentee voting in federal elections. In 42 U.S.C. § 1973ee–3, Congress has prohibited states from requiring handicapped persons to submit medical certification to receive an absent ballot for a "federal election." It has also required states to provide elderly and handicapped voters with notice of procedures for voting absentee in federal elections. In 42 U.S.C. § 1973ff–1 Congress has required that States permit "absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary and runoff elections for federal office." Congress's usage of "federal election" in these statutes is not in reference to the day absentee votes are cast, because clearly Congress contemplated that the casting of absentee votes could and in most cases almost necessarily would be done in advance of federal-election day. Thus, Congress in these statutes specifically addressing voting in federal elections, has not used the term "election" as synonymous with the day votes are cast.

C. The Ninth Circuit appropriately did not conclude that the 1872 statute foreclosed all voting in advance of election day.

There are several reasons why the Ninth Circuit — as well as the other circuits that have considered the question — appropriately did not conclude based on text and legislative history that Congress, in enacting the 1872 statute, intended to limit all voting to election day. First, as the Ninth Circuit recognized, searching the legislative history for evidence of Congress' actual intent "presents all the usual problems of legislative history, such as not knowing whether those who

spoke represented the views of those who did not speak." App. 7. That observation is particularly apt given the very few congressmen who actually said anything relevant to the issue of voting in connection with federal elections in 1872.

Second, when the 1872 statute was enacted, States were permitting absentee voting, at least by soldiers. App. 14. That no one expressed the intent to eliminate absentee voting should be almost irreconcilable with the contention that Congress intended to prohibit all forms of early voting.

Third, the multi-day voting proposal that was rejected was addressed to voting *after* federal-election day, not before. Allowing voting after federal-election day would disserve other congressional objectives — such as preventing states that conclude their elections early from influencing the outcomes in states that conclude their elections later. It very well could be that Congress did not want to allow voting to occur after federal-election day, but, in light of the emergence of absentee voting for soldiers, intended to say nothing about whether voting should also be prohibited before federal-election day.

Finally, the Ninth Circuit, as did the Sixth and Fifth Circuits, properly declined to conclude that Congress had preempted the states' early voting laws given that Congress did not clearly express its intent in the 1872 statute to prohibit all such laws. Regulating elections in general and voting in particular is a core area of state responsibility and sovereignty. *Lassiter v. Northhampton County Bd. Of Elections*, 360 U.S. 45, 50 (1959) ("The States have long been held to have broad powers to determine the conditions under which the right to suffrage may be exercised.") Article I, section 4 of the United States Constitution recognizes this responsibility even in the regulation of voting in federal elections.[12] Whenever a ques-

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[12] Article I, Section 4, clause 1 of the United States Constitution provides:

tion of preemption arises as to an area traditionally occupied by the States, this Court must satisfy itself that Congress clearly has articulated its intent to preempt. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946) (When Congress legislates in an area that States have "traditionally occupied * * * we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715–16 (1985) (same).[13] In the present case, the only clear expression of congressional intent is to require a uniform day for federal elections. That is not sufficient to demonstrate that Congress's clear and manifest purpose was to prohibit all voting in advance of federal-election day.[14]

D. Congress, rather than this Court, should address petitioners' policy-laden concerns about early voting in federal elections.

Petitioners express policy concerns that early voting laws, for example, will promote election fraud (Pet. 33), will allow

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The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[13] This Court most recently applied the clear statement principle in *Raygor v. Regents of the University of Minnesota*, No. 00-1514, Feb. 27, 2002, 2002 WL 269234 (Holding that 28 U.S.C. § 1367 does not toll the limitations period for state law claims asserted against nonconsenting state defendants that are dismissed on Eleventh Amendment grounds).

[14] Whether Article I, section 4 is viewed as a delegation of power to the States or an express reservation of power in the States, subject to Congress' override, should not affect the pre-emption analysis. As with powers exercised by States that affect interstate commerce, thus giving Congress the power to override state authority, Congress must be clear about its intent to do so.

citizens to vote based on "knowledge available on a smattering of days," (Pet. 32, quoting the report of the National Commission on Election Reform, "To Assume Pride and Confidence in the Elections Process," at 43) and will "open the door . . . to further balkanization of the timing of voting in federal elections (Pet. 36).

Whether early voting in federal elections in the 21st Century should be banned altogether, whether it should be limited to "for cause" absentee balloting, or whether individual states should have the freedom to make it an option for a wider class of voters — or even all of its voters —is a policy issue that should be left to Congress to decide. Not only is Congress uniquely situated to consider and evaluate the arguments for and against early voting, and the breadth of any early voting that should be allowed, Congress presently has before it two bills, one in each chamber, that address voting reform.[15] Within the context of considering voting reform, there can be little to no doubt that Congress is aware of states' early-voting practices.[16] This Court, at a minimum, should give Congress a full opportunity to address the issues and to weigh the consequences of any policy decision to restrict early voting.

Finally, petitioners agree that, under their argument, States would be required to allow some groups of voters to vote early, by absentee, in presidential elections, and could allow other groups to do so as well. But a necessary by-product of their argument, if accepted, would be that States could not allow those same groups to vote absentee in off-year federal elections. Every two years then, States would have to shift back and forth, mandated by Congress to allow absentee voting one election but prohibited by Congress from allowing

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[15] The two bills are S. 565 and H.R. 3295.

[16] See, e.g., Cong. Rec. S1415-17 (daily ed. March 4, 2002) (discussion and vote on motion to bring debate on S. 565 to a close).

any the following election. That is a necessary product of petitioners' argument, because — they assert — only absentee voting mandated or expressly authorized by Congress — *i.e.* that provided for in 42 U.S.C. section 1973aa — could survive the 1872 prohibition on early voting. This is but another reason why Congress, not this Court, should sort out the early-voting question this case poses.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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